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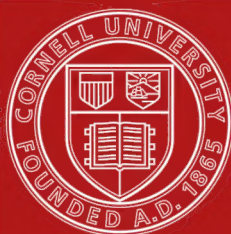
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A treatise on the law of corporations of



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THE
LAW OF CORPORATIONS.

A TREATISE
ON THE
LAW OF CORPORATIONS
OTHER THAN MUNICIPAL.

WITH
CITATIONS FROM THE ENGLISH AND UNITED STATES COURTS,
AND FROM THE COURTS OF EVERY STATE AND
TERRITORY IN THE UNION.

BY
hitney
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OF TRESPASS," "SET-OFF, RECOUPMENT, AND COUNTER-CLAIM," ETC.

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PREFACE.

THE following pages, the result of six years of continuous research in the field of corporate law, during which each one of the several thousand cases cited was carefully examined by the author, embrace the subject in the various aspects which present themselves to the inquirer. Beginning with the origin of corporations, it traces its development from feeble beginnings to the present time, when it has acquired a vigorous and sturdy growth entering into the most important relations of business. In this country especially, it has attained a magnitude, and an interest, which cause it to rank among the leading topics of the law. The distinction between a corporation and partnership, and also between a corporation and the several unincorporated associations, is clearly drawn, and it is shown why the former is superior. The several steps from the creation to the final dissolution of a corporation are then given in detail, and every proceeding which is likely to occur in practice is fully explained. For an intelligent understanding of many of the decisions a history of the causes which led to them, and the successive steps taken with the result became necessary, and thus while much was gained in explicitness the work was somewhat enlarged. This, however, will be found an advantage which would have been lost with more brevity.

The writer is indebted to the able and unremitting assistance of RADCLIFFE LOCKWOOD, Esq., during three years of labor in the examination of authorities, and much valuable and discriminating research in the preparation of the work is owing to his industry.

All of the later decisions, and most of the earlier ones, on corporate law are cited, and none were adopted without a careful examination by the author. Most of the decisions were found in the State library at Binghamton, but access was also had to the State library in Albany, which supplied needed deficiencies. This required a large expenditure of time and labor, and an accumulation of materials, which are herewith presented. Care was taken to avoid errors of citation, which notwithstanding may have sometimes occurred, but it is hoped and believed that this will seldom, if ever, be encountered.

T. W. W.

BINGHAMTON, N. Y., February, 1888.

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THE LAW OF CORPORATIONS

OTHER THAN MUNICIPAL.

CHAPTER I.

MEANING, HISTORY, AND OBJECT.

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§ 1. **Different ideas respecting.**—The precise nature of a corporation aggregate, abstractly and technically considered, so long as its distinguishing features and attributes are correctly understood, is not perhaps of very great importance; though the diverse views of writers on the subject have attracted some attention, and occasioned more or less criticism. A corporation has been variously characterized as: “A collection of many individuals united into one body under a special denomination, having perpetual succession under an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual”;¹ “A political person capable like a natural person of enjoying a variety of franchises”;² “A franchise possessed by one or more individuals who subsist as a body politic”;³

¹ Kyd on Corp. 13.

² Ibid. 15.

³ 2 Kent's Com. 266. The term “franchise” has several significations,
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and there is some confusion in its use.

“The better opinion deduced from the authorities seems to be that it consists of the entire privileges embraced in

“An artificial being, invisible, intangible, and existing only in contemplation of law”;¹ “An artificial intellectual being, the mere creature of the law”;² “An artificial body of men composed of divers constituent members *ad instar corporis humani*, the ligaments of which body politic or artificial body are the franchises and liberties thereof which bind and unite all its members together, and in which the whole frame and essence of the corporation consist”;³ “A body created by law composed of individuals united under a common name”;⁴ “A body politic or corporate formed and authorized by law to act as a single person, a society having the capacity of transacting business as an individual”;⁵ “A juridical being separate and distinct in its rights and obligations from the individual members who compose it”;⁶ “A society created by the sovereign power”;⁷ “A legal institution”;⁸ “A person which exists in contemplation of law only, and not physically.”⁹ Extracts similar to the foregoing might be greatly multiplied. Sufficient have been given to show three distinct conceptions of a corpo-

and constituting the grant.” BUTLER, J., in *Bridgeport v. N. Y. & New Haven R.R. Co.*, 36 Conn. 255. “It is a franchise for a number of persons to be incorporated and subsist as a body politic, with a power to maintain perpetual succession, and do other corporate acts.” 2 Blk. Com. 37. “A franchise is a privilege or immunity of a public nature which cannot legally be exercised without a legislative grant. The various powers conferred on corporations are franchises. The execution of a policy of insurance by an insurance company, and the issuing of a bank note by an incorporated banking company, are franchises. Without legislative authority, neither could lawfully be done by a corporation; and were a bank to execute a policy of insurance, or an insurance company to issue bank notes, such acts would be usurpations

of franchises. The very existence of a corporation is a franchise; and every act of a corporation affecting the public is the exercise of a franchise.” SAVAGE, Ch. J., in *People v. Trustees of Geneva College*, 5 Wend. 211. See *Chicago City R.R. Co. v. People*, 73 Ill. 541.

¹ MARSHALL, C. J., in *Dartmouth College v. Woodward*, 4 Wheat. 636.

² *Regents of University of Md. v. Williams*, 9 Gill & Johns. 365.

³ *Bac. Abr. Corp. A.*

⁴ *Angell & Ames on Corp.* 1.

⁵ *Webst. Dict.*

⁶ *Curien v. Santini*, 16 La. Ann. 27. See *Soc. of Practical Knowledge v. Abbott*, 2 Beavan, 559.

⁷ *HOSMER, Ch. J.*, in *Greene v. Dennis*, 6 Conn. 293.

⁸ 1 *Dillon on Municip. Corp.* 91.

⁹ *Green's Brice's Ultra Vires*, 1.

ration, to wit: An artificial body or political person; a number of individuals authorized by law to act under a collective name as one person; and a privilege or immunity of a public nature legally exercised.

§ 2. **Definition.**—A corporation aggregate is a body created by law composed of several persons under a special denomination, with the capacity of a continuous succession, and of acting in many respects as an individual, always maintaining its identity, and possessing, however long its duration, the same rights, privileges, duties, and liabilities.¹ “A corporation or community,” says an old writer, “is a collection or an assembly of several individual persons united in one mystical body, called a body politic, by permission and grant of the prince, but distinguished from those persons that compose a State; and it is established for the common good of those who are of this body politic. . . . A corporation represents one person which is distinct from the individual members of such corporation; because though all the members of such corporation should be dead, yet it is the same body politic still, if others are substituted in their room.”² The definition given by Mr. Kyd, whose work on corporations, though published in England nearly one hundred years ago, is still regarded as a sound and able exposition of many of the leading principles of the subject, is as follows: “A corporation is a collection of many individuals united into one body under a special denomination, having perpetual succession under an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations, of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights more or less extensive according to the design of its institution

¹ See *Wallace v. Mayor of N. Y.*, 2 Hilt. 440.

² Ayliffe, *Civ. L.* 196.

or the powers conferred upon it either at the time of its creation or at a subsequent period of its existence.”¹ In the Dartmouth College case Chief-Justice MARSHALL said: “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality, properties by which a perpetual succession of many persons are considered as the same and may act as a single individual. They enable a corporation to manage its own affairs and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances for the purpose of transmitting it from hand to hand.”²

• An approved modern text writer defines a corporation as “A fictitious person created by special authority and endowed by that authority with a capacity to acquire rights and incur obligations as a means to the end for the attainment of which the corporation is created. It is chiefly for the purpose of clothing bodies of men with these qualities and capacities that corporations were invented and are in use. By these means a perpetual succession of individuals is capable of acting for the promotion of the particular object like one immortal being.”³ An insurance company,

¹ 1 Kyd on Corp. 13.

² Dartmouth College v. Woodward.

⁴ Wheat. 636. In *People v. Assessors*, 1 Hill, 616, BRONSON, J., characterized a corporation aggregate as “a collection of individuals united into one body under such a grant of privileges as secures a succession of members without changing the identity of the body, and

constitutes the members for the time being one artificial person or legal body capable of transacting some kinds of business like a natural person. A corporation is therefore said to be a legal being, or the mere creature of the law.”

³ Lindley on Partnership, 4th Eng. Ed. 4. “In some corporations the

organized in England under a deed of settlement legalized and enlarged by acts of Parliament, and doing business in Massachusetts, possessed the following attributes: 1. A distinctive name; 2. Power to sue and be sued in the name of one of its officers; 3. Perpetual succession by the transfer of its stock; existence as an entity apart from the shareholders, enabling it to sue its stockholders and to be sued by them. It was held a corporation, notwithstanding several acts of Parliament had declared that it should not be thus deemed. The court remarked that whatever might be the effect of such a declaration in the English courts, it could not alter the nature of a corporation, or prevent the courts of another jurisdiction from inquiring into its real character.¹ It is not essential to the character of a corporation that its powers should be equal to any similar associa-

whole powers rest in a select body, or in select bodies, with powers to perpetuate their own corporate existence by filling vacancies in their own body; and such body or bodies constitute the corporation itself, and the meetings and acts done thereat are the meetings and acts of the corporation itself. . . . There are corporations of another sort, where the aggregate body or corporators meet to discharge corporate functions, and have authority also to perform certain acts and duties by means of different agents sometimes designated by the statutes creating them, and sometimes left to their own choice. Of this nature are the townships where the inhabitants are corporators, and assemble to exercise corporate powers, and have authority to appoint various officers to perform public duties under the guidance and direction of the corporation. Such are the selectmen for the ordinary municipal concerns, overseers of the poor, school committees, assessors of taxes, and various other functionaries. In these cases, the va-

rious officers form different boards for the performance of different duties subordinate to the corporation; but they do not constitute the corporation, nor are their meetings the meetings of the corporation. In the latter cases the records of the officers are properly records of their own proceedings, and not of the proceedings of the corporation itself." STORY, J., in *Bank of U. S. v. Dandridge*, 12 Wheat. 64.

¹ *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566, aff'g S. C. 100 Mass. 531, BRADLEY, J., dissenting. It seems to be the policy of the English law to attach certain consequences to incorporated bodies, such as exemption of the members from individual liability, which render it desirable there, that associations like the above should not become, technically, corporations. The court remarked that local policy of that nature could have no place here in determining whether an association, whose powers are ascertained, and its privileges conferred by law, is an incorporated body.

tion. It is sufficient if, in its corporate name, it exercises the powers and rights of a natural person in the management of its concerns.¹

§ 3. **Has a separate and distinct existence.**—It has been said that a corporation is only *in abstracto*; that it is invisible, and rests only in intendment of law;² and that considered as a tangible fact, it is a fiction, a shade, a non-entity.³ But it is not perceived how a corporation is more a fiction than any other legally organized body. When “a corporation is said to be invisible, that expression must be understood of the right of many persons to act as a corporation, and then it is as visible in the eyes of the law as any

¹ *Falconer v. Campbell*, 2 McLean, 195. Association, in the sense that it is confederacy or union for particular purposes, “is a generic term, and may indifferently comprehend a voluntary confederacy which is a partnership dissoluble by the persons who formed it, or a corporate confederacy deriving its existence from a statute, and dissoluble only by the law.” COWEN, J., in *Thomas v. Dakin*, 22 Wend. 9. A common name has been regarded as a corporate criterion. In reference to this, Lord ELLENBOROUGH, in *Rex v. Webb*, 14 East. 406, said: “As to the fourth point, that the subscribers have presumed to act as if they were a body corporate, how is this made out? It was urged that they assumed a common name, that they have a committee, etc. But are these the unequivocal evidence and characteristics of a corporation? How many unincorporated assurance companies and other descriptions of persons are there that use a common name, and have their committees, general meetings, and by-laws? Are these all illegal? or which of these particulars can be stated as being of itself the distinctive and peculiar criterion of a corporation?”

² *Case of Sutton's Hospital*, 10 Rep. 32 b. As touching corporations, Chief Baron MANWOOD is reported to have said that “they are invisible, immortal, and have no souls, and therefore no subpoena lieth against them, because they have no conscience, no souls. A corporation is a body aggregate; none can create souls but God; but the king creates them; and therefore they have no souls. They cannot speak, nor appear in person, but by attorney.” *Tippling v. Pexall*, 2 Bulst. 233.

³ *Green's Brice's Ultra Vires*, 2d Am. Ed. 2. “A corporation cannot, as such, commit offences and crimes; for it is a person in notion, and by fiction only. Therefore the delinquents in the corporation ought to be punished, but not that which is incorporeal, and merely a right.” *Wood's Civ. L.* 135. A corporation has no body which can be arrested. *Nichols v. Thomas*, 4 Mass. 232. It has been said that “a corporation cannot be beaten nor beat, nor commit treason or felony, nor be imprisoned for a disseizin with force, nor be outlawed, nor a *capias* in debt be awarded against it.” *PARSONS, C. J.*, in *Riddle v. Proprietors, etc.*, 7 Mass. 169.

other right whatever of which natural persons are capable.”¹ The corporation has an existence separate and distinct from the persons composing it, who cannot individually exercise corporate powers, enforce corporate rights, or, as a rule, be made responsible for the corporate acts.² A few of the numerous instances that might be mentioned will be stated to show this. “When a corporation is seized in fee of freehold, the entire inheritance is in the corporation, and the members are no more seized than the members of a man’s body could be said to be seized of his estate.”³ And

¹ 1 Kyd on Corp. 16.

² “Corporations, communities, or colleges are civil persons, and have their civil capacities as one body.” Wood’s Civ. L. 134. “A corporation is a civil institution, or, as it is sometimes termed, a body politic, the essential character of which is that it has a legal existence as a person under the name given it by legislative authority, either by express charter, or by prescription, which implies a charter.” New Am. Cycl., tit. *Corporation*. “A grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability.” FIELD, J., in *Paul v. Virginia*, 8 Wall. 168. “The very purpose of incorporation is to create such legal and ideal person in law distinct from all the persons composing it, in order to avoid the extreme difficulty, and perhaps it is not too much to say the utter impracticability, of such a number of persons acting together in their individual capacities.” SHAW, C. J., in *Smith v. Hurd*, 12 Metc. 371. In an approved English work the following concise, clear, and forcible language is employed: “A corporation aggregate consists of several individuals united in such a man-

ner that they and their successors constitute but one person in law, a person distinct from that of any of the members though made up of them all, and whose privileges and possessions when once vested in it will forever be vested without any new conveyance to new successors; for all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law; as the river Thames is the same river, though the parts which compose it are changing every instant. From this distinction between the aggregate existence of the corporation and the individual existence of each of its members, it follows that they may sue and be sued by one another in a court of law.” *Smith’s Mercantile Law*, 3d Am. Ed. 140.

³ MAULE, J., in *Baxter v. Brown*, 7 M. and Gr. 210. “Corporators, where the corporation is possessed of personalty or real property, have in general no individual share, right, title, or estate to or in any specific part or portion thereof, which is wholly vested in the ideal entity or abstraction, the corporation, and not in the body or persons who happen to be at any given time the existing corporators, either jointly, severally, or as joint tenants or tenants in common, or in any other

it was held that a corporation might be a British subject, though composed wholly of aliens.¹ Where a bond was given to several persons who were governors of a voluntary association which was afterward created a corporation, it was held that the obligor was not liable in an action by the corporation, it being a different body from the association.² So a corporation may sue its members, and the members may sue the corporation.³ "In the abstract, it is not a person, nor an animated body, but is only a kind of intellectual body, or the representative of a body animated. In the concrete, it is taken for the particular members of such corporation."⁴ Corporations have, however, been included in terms of description appropriated to persons.⁵ Domat says: "Communities that are lawfully es-

mode or way whatsoever." Grant on Corps. 5. In *Peabody v. Flint*, 6 Allen, 52, it was said by CHAPMAN, J., that "the corporation itself holds its property as trustee for the stockholders, who have a joint interest in all its property and effects, and each of whom is related to it as *cestui que trust*."

¹ Reg v. Arnaud, 16 L. J. N. S. Gr. B. 55.

² *Dance v. Girdler*, 1 N. R. 34; *Metcalf v. Bruin*, 12 East. 14; Vin. Abr. 38, Pl. 6. But see *Edwards v. Grand Junc. R.R. Co.*, 1 M. & Cr. 650.

³ *Pierce v. Partridge*, 3 Metc. 44; *Gifford v. N. J. R.R. Co.*, 10 N. J. Eq. (2 Stockt.) 171; *Barnstead v. Empire Mining Co.*, 5 Cal. 299; *Booker Ex parte*, 17 Ark. 338; *Samuel v. Holliday*, 1 Woolw. 418; *Sawyer v. Meth. Epis. Soc.*, 18 Vt. 405; *Rogers v. Danby Universalist Soc.*, 19 Id. 187; *Waring v. Catawba Co.*, 2 Bay. 109. "As a corporation or body politic may bring an action and implead a person, so it may also be impleaded and brought into judgment. But then such corporation ought to appear by its syndick or attorney, since it cannot appear in

its own person. And when a process is served upon a corporation, it ought to be on the person of the administrator or syndick; and an attachment lies against their goods, and a sequestration on their lands, if they do not appear by their syndick. But the particular or individual members of a corporation cannot be convened for the debt of the corporation. For, as that which is due to a corporation at large and collectively is not due to the particular members of such corporation, and cannot be recovered by them in their separate capacities, so the particular members thereof may not be sued for the debts of such corporation at large. Yet when a particular member is constituted as a syndick to bind the whole body, and all and every member thereof, a particular member may then be sued for the debt of the corporation; because such syndick represents the corporation, especially if all the members were present at the constituting of such syndick." Ayliffe, Civ. L. 197.

⁴ Ayliffe, Civ. L. 196.

⁵ *McIntire v. Preston*, 5 Gilman, Ill. 48. A corporation is a person when

established (corporations) are in the place of persons, and their union, which renders common all their interest, makes them to be considered as one single person."¹ The German jurisprudence, founded on the Roman law, carried the idea that personality was essential to corporations. Heineccius, in his essay on the legal history of the corporate guilds or societies of trade in Germany,² speaks of this per-

placed in circumstances identical with those of a natural person. *United States v. Bank of North Carolina*, 6 Pet. 29; 12 Id. 134, 135; *United States v. Amedy*, 11 Wheat. 392; *Cincinnati Gas Light, etc., Co. v. Avondale*, 43 Ohio St. 257; *Lynchburg v. Norfolk, etc., R.R. Co.*, 80 Gratt. 237. Private corporations are persons so far as property is concerned. *San Mateo County v. Southern Pacific R.R. Co.*, 13 Fed. Rep. 722; 8 Sawyer, 238; but not within section 1 of the Constitution of the United States. *Insurance Co. v. New Orleans*, 1 Woods, 85. It has been said that the term "person" includes a corporation, unless it appears to have been used in a more limited sense. *In re Oregon Bulletin, etc., Co.*, 18 Bankr. Reg. 199.

¹ Domat, Civ. L., lib. 1, title 15.

² Ch. 77, sec. 19. Corporations are deemed persons for the purpose of bringing actions, and also of jurisdiction. *Bank of U. S. v. Deveaux*, 5 Cranch, 61; *Rundle v. Del. & Raritan Canal Co.*, 14 How. 80; *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149. Where the charter provided that no action should be brought against any person for anything done pursuant to the act of incorporation without a previous notice of twenty days, it was held that the word person included the corporation, and that it was entitled to the notice. *Boyd v. Croyd R.R. Co.*, 4 Bing. N. C. 669. Whenever rights or remedies are given by a statute to "persons,"

corporations, if within the equity of the statute, are entitled to them. *Lehigh Bridge Co. v. Lehigh Coal & Nav. Co.*, 4 Rawle, 9. The words "living person" in the New York Code of Procedure of 1857, were held to embrace corporations. *La Farge v. Exchange Fire Ins. Co.*, 22 N. Y. 352; *Field v. N. Y. Cent. R.R. Co.*, 29 Barb. 176; *Wright v. same*, 28 Id. 80; *Johnson v. McIntosh*, 31 Id. 267; *Wallace v. Mayor, etc., of N. Y.*, 2 Hilton, 440. And the word "person" in the New York statute of limitations includes them. *Olcott v. Tioga R.R. Co.*, 20 N. Y. 210. An act subjecting land to entry "by any person or persons wishing to make the same," was held to embrace corporations. *State v. Nashville University*, 4 Humph. 157. In the last mentioned case it was assumed by counsel that, although corporations are included in all legal enactments in which duties and liabilities are imposed upon persons, yet they should be excluded from the meaning of the word when a benefit is to be obtained. But no authority was produced showing any such distinction. It was held that a corporation might give a negotiable promissory note within the statute of 3d and 4th of Anne, although the statute was confined to notes when drawn "by any person." *Mott v. Hicks*, 1 Cowen, 513; *State of Ind. v. Woram*, 6 Hill, 33. Corporations are persons within penal statutes. *U.S. v. Amedy*, 11 Wheat. 392. It has been repeatedly decided that they are

sonality as an attribute of all corporations. The property of a corporation is legally vested in itself, and not in its members. As individuals they cannot, even by joining together unanimously, convey a title to it. Nor can they make a contract that will bind it, or enforce by action a contract that has been made with it. The artificial person

such in reference to the statutes of usury in cases where banks are resisting as well as seeking that application of the law. See *Thornton v. Bank of Washington*, 3 Pet. 36, 42; *Commercial Bank of Manchester v. Nolan*, 7 How. Miss. 508; *Grand Gulf Bank v. Archer*, 8 Smed. & Marsh, 151. Corporations are deemed persons within a clause in a treaty, as to confiscation and prosecution. *Soc. for Propagation of the Gospel v. New Haven*, 8 Wheat. 464. They are so regarded within the act of Congress of April 20, 1871 (17 U. S. Statutes at Large, 13), which provides that "any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage to the contrary notwithstanding, be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." *Northwestern Fertilizing Co. v. Hyde*, 13 Biss. 480. A corporation was deemed a person within the insolvent laws of Maryland. *State v. Bank of Md.*, 6 Gill & Johns. 205. A corporation was held not a person within the New York attachment laws, 24th Sess., ch. 49. *M'Queen v. Middletown Manuf. Co.*, 16 Johns. 5. But the contrary was held with reference to the attachment laws of Illinois, Tennessee, and Alabama.

Mineral Point R.R. Co. v. Keap, 22 Ill. 9; *Bank of Ala. v. Berry*, 2 Humph. 443; *Planters' & Merchants' Bank of Mobile v. Andrews*, 8 Porter, 404. In *Trenton Banking Co. v. Haverstick*, 6 Halst. 171, it was objected that the law of New Jersey required, in order to obtain an attachment, that the oath must be made by the applicant for the writ, and that as an artificial person could not make an affidavit, the bank could not entitle itself to that remedy. But it was held that the law necessarily conferred authority to perform services like that on the agents of the corporation, and that the affidavit could be made by the cashier, or president, or one of the acting clerks of the bank. In *Rex v. Gardner, Cowper*, 79, it was held that the poor rates on vacant ground belonging to a corporation might be assessed to the corporation as being an inhabitant or occupier of the ground. See *Bank of U. S. v. Deveaux*, 5 Cranch, 61; *Soc. for Propagation of the Gospel v. Wheeler*, 2 Gallis, 105. In New York it was held at an early day that under the tax and assessment law corporations were liable to assessment, although the act only spoke of persons. *Clinton Woolen & Cotton Manuf. Co. v. Morse*, Supm. Ct., Oct. term, 1817, cited in *People v. Utica Ins. Co.*, 15 Johns. 358. It was decided that corporations were within the act of New York of 1855, ch. 137, providing that all persons or associations doing business in the State, and not residents, should be assessed and taxed on all sums, invested in any manner in

called the corporation must manage its affairs in its own name as exclusively as a natural person manages his property and business. The officers, though chosen by vote of the stockholders, are not their agents, but the agents of the corporation, and they are accountable to it alone. Therefore one or more of the stockholders cannot maintain an

said business, the same as if they were residents of the State. *International Life Ass. Soc. v. Commrs. of Taxes*, 28 Barb. 318; *Parker Mills v. Commrs. of Taxes*, 23 N. Y. 242. Under the act of 39 Eliz., ch. 5, providing that all and every person and persons might found hospitals for the poor and incorporate them, it was held that a municipal corporation was included in the words "every person and persons." *Newcastle v. Atty. Genl.*, 12 Clark & Fin. 402. The word "individuals" in an act may include corporations. *Pa. R.R. Co. v. Canal Commrs.*, 21 Pa. St. 9. This was held to be the case where a statute of Massachusetts of 1853, ch. 319, sec. 3, provided that no abatement should be made of the taxes assessed upon any individual until he had filed a list of his estate liable to taxation, and made oath to the same. *Otis Co. v. Inhab. of Ware*, 8 Gray, 509. A corporation, in respect to the taking of its property by the exercise of the power of eminent domain, is considered as a mere citizen owner. *Bellona Co.'s Case*, 3 Bland Ch. 442. So, when created and doing business in a particular State, it is to be deemed to all intents and purposes a person, although an artificial person, an inhabitant of the State for the purposes of its incorporation, capable of being treated as a citizen of that State as much as a natural person. *Louisville R.R. Co. v. Letson*, 2 How. 497, aff'd in *Marshall v. Balt. & Ohio R.R. Co.*, 16 How. 314, and in *Covington Draw Bridge Co. v. Shepherd*, 20 Id. 232; *Ohio & Miss. R.R. Co. v. Wheel-*

er, 1 Black. 286. "The word *person* includes a corporation as well as a natural person." Code of Ark., 1874, p. 991, sec. 5625. "The word *person* may be extended to bodies corporate." Public Statutes of Mass., 1882, p. 59; Rev. Sts. of Me., 1871, p. 58; Rev. Laws of Vt., 1880, p. 77, sec. 21; Code of Iowa, 1873, p. 8, sub. 13.

The word "person," however, being generally understood as denoting a natural person, it is to be taken in that sense, unless from the context or other parts of the act it appears that corporations were also intended to be embraced. Where an act provided that all debts due from solvent debtors by notes, penal or single bills, bonds, judgments, or mortgages, and stocks on which any dividend or profit was received by the holder which were owned or possessed by any person, should be subject to a tax, it was held that the term "person" did not include corporations. *School Directors v. Carlisle Bank*, 8 Watts, 289. A bank or other corporation is not a person within the act of Congress of 1797, ch. 74, sec. 5, which provides that "where any revenue officer or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor in the hands of executors or administrators shall be insufficient to pay all debts due from the deceased, the debt of the United States shall be first satisfied; and the priority hereby established shall be deemed to extend as well to cases in which a

action at law against the officers for any breach of official duty that injures the corporate property as a whole. An injury done by the directors of a corporation to an individual, by inducing him to become a member by means of false representations, is actionable, because it is a wrong to him personally, and not to the corporation. But the interest of stockholders, as such, is a qualified and equitable interest.

§ 4. *Special attributes.*—The essential characteristic of a corporation is the merging of the members into one distinct, artificial, individual existence,¹ so that it may act with the will of a single person, and the body be kept by a perpetual succession.² The authority to have property held in perpetual succession is essentially a corporate power. "This is the very end of the incorporation; for there cannot be a succession forever without an incorporation."³ The rights and privileges of the corporation do not determine or vary upon the death or change of any of the individual members, but continue as long as the corporation endures. It is sometimes said that corporations

debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed." 1 U. S. Sts. at Large, 512; *Com. v. Phoenix Bank*, 11 Metc. 129. The statute of New York requiring every person who owns and occupies land in the town in which he or she resides to work on the public highway, does not include corporations. *Bank of Ithaca v. King*, 12 Wend. 390. Ordinarily a law which in general terms speaks of plaintiffs and defendants, applies to persons only, and municipal corporations are not affected by its provisions, unless expressly named and

brought within them. *Schuyler Co. v. Mercer Co.*, 4 Gilman, 20. The word "resident," occurring in the constitution or in a statute, ordinarily means an individual, a citizen, and not a corporation. Independent of the cases making corporations inhabitants and residents by construction for certain purposes, the natural, ordinary, and literal meaning of the term, residents of a town, would not include corporations. *People v. Schoonmaker*, 63 Barb. 44. See *Pyrolusite Manganese Co. v. Ward*, 73 Ga. 49; *Insurance Co. v. New Orleans*, 1 Woods, 85.

¹ *Warner v. Beers*, 23 Wend. 155.

² *Mahony v. Bank of the State*, 4 Ark. 620.

³ *Thomas v. Dakin*, 22 Wend. 102.

are immortal. But the immortality of a corporation means only its capacity to take in perpetual succession so long as the corporation exists.¹ "It is calculated for and capable of duration forever where no limitation is fixed by the act that creates it; though it may be brought to a termination by accident, or by certain defaults of duty on the part of its members at any period."² Grotius, speaking of the state of a corporation,³ says: "Isocrates, and after him the Emperor Julian, said that States were immortal; that is, they might possibly prove so; because the people is one of those kinds of bodies that consist indeed of separate and distinct members, but are, however, united in name as having one constitution only. . . . Now this spirit or constitution in the people is a full and complete association for political life. And the just and immediate effect of it is the sovereign power, the bond that holds the State together, the breath of life. For these artificial bodies are like the natural. The natural body continues to be still the same, though its particles are perpetually upon an insensible flux and change, whilst the same form remains." "The necessity of such bodies is evident whenever rights ought to be continued beyond the lives of the persons possessed of them. That rights should in this manner survive, must be often requisite to the good of the public; and the most easy and convenient way of keeping them alive is by the creation of such artificial persons, a kind of intellectual bodies consisting of individual members, but in the abstract distinguished from them."⁴

¹ 2 Kent Com. 268; *People v. Assessors*, 1 Hill, 616. "Banks are none the less regarded as corporations because their charters are limited to a term of years. It is enough that they enjoy the right of succession for that term." COWEN, J., in *Thomas v. Dakin*, *supra*.

² *Wallace v. New York*, 2 Hilt. 440.

³ Book 2, ch. 9, sec. 3. It has been

aply said that the chief point of difference between the natural and artificial person is, that the former may do whatever is not forbidden by law, and the latter can do only what is authorized by its charter. *Railroad Co. v. Harris*, 12 Wall. 65.

⁴ Browne's Civ. Law, 141. Ayliffe (*Civ. L.* 197, 198) says: "A corporation approved by law may have goods

§ 5. **How constituted.**—A corporation generally consists of members in their natural capacity. But it may be composed of persons in their political capacity, of members of other corporations, or of other corporations : as in the case of Christ's Hospital, of Bridewell, chartered by Edward the Sixth, of which the mayor, citizens, and commonalty of London were made the governors, and incorporated by the

and estates in common, as any individual and single person may have an estate proper to himself,—as woods, pastures, fish-ponds, and a common chest or treasury for money. But the goods and estates of a corporation are not the goods and estates of the particular members considered separately, but of all the members, as they make one collective body, and are allotted for their common use. . . . It has been a doubt indeed among the doctors whether a corporation may properly be said to possess a thing ; many of them holding the negative, viz. : that a corporation is only said to possess a thing by impropriety of speech. Others say that a corporation itself cannot be said to possess a thing, but only those persons are in possession unto whom the administration is granted,—first, because a corporation is a person represented, and therefore cannot possess a thing ; secondly, because a corporation does not seem to possess any ability of consenting, because in a corporation there are infants, pupils, madmen, and many others who cannot consent. But possession is not acquired without an intention and consent ; wherefore a corporation cannot possess a thing. Hence it seems that as those things which are in the common and promiscuous use of men, as a market and the like, cannot be possessed, but are only promiscuously made use of by the people of such corporation, as in like manner other things are in common to such bodies politic

and cannot be possessed by them, according to the opinion of these men. But I think the contrary is the better opinion ; as that a corporation and the inhabitants thereof may properly be said to possess a thing either in their own persons, or else by their servants and syndicks, or by other administrators. For though a corporation be only a person by fiction of law, yet the property and possession of a thing is lodged in the corporation itself, and not in the individuals of a corporation." Again he says : "A corporation may, in its own person, whenever it pleases, do any extrajudicial act, as make contracts and the like, and shall not be compelled to constitute a syndick (as in judicial acts) for the despatch of any public business of this kind. . . . And as a corporation may contract with persons who are not such corporation, so, according to Bartolus, it may make contracts with its own members, and they shall be valid. Corporations are bound by their contracts after the same manner as individual persons are. For though a corporation cannot separately and individually give their consent in such a manner as to oblige themselves as a collective body, yet, being lawfully assembled, it represents but one person, and may consequently make contracts, and by their collective consent oblige themselves thereunto. And thus a corporation may consent, though not with the same readiness and facility as particular persons."

name of The Governors, etc., of the Hospital of Edward the Sixth of England, of Christ, Bridewell; and the cases of the Universities of Oxford and Cambridge, of which the many colleges (distinct and separate corporations) within the universities form component parts of those larger corporations. So, the act for founding a university in Baltimore provided that the College of Medicine of Maryland, which was a chartered institution, might constitute and annex to itself three other colleges or faculties, viz. : the faculty of divinity, the faculty of law, and the faculty of the arts and sciences; the four faculties or colleges thus united, to be one corporation of the name of The Regents of the University of Maryland. It was held that the College of Medicine and the University were distinct and independent corporations.¹ And the individuals, or any of them, who in their natural capacity compose one corporation, may, in the same capacity, compose another distinct and separate corporation : as the president and directors of one bank, or any number of them, may be the president and directors of another bank, or the incorporated managers of any other institution.² There was a combination of interests of three corporations, and they occasionally met and voted conjointly, while at other times they held separate meetings, and kept separate records. The same persons were members of all of the corporations, and their corporate interests had become identified by the equalization of shares in the several companies. It was held that in a suit at common law the three companies might be regarded as three distinct legal persons.³

“There is substantially no more objection to a State creating a corporation, to be composed of corporations

¹ Regents of University of Md. v. Williams, 9 Gill & Johns. 365. To enable a corporation to be regarded as composed of distinct integral parts, the members of each class must be definite.

² Atty. Genl. v. Brazen, etc., College Oxon., 8 Bligh, N. S. 377; Rex v. Colchester, cited 3 Term. Rep. 234.

³ Proprs. of Canal Bridge v. Gordon, 1 Pick. 297.

chartered by different States, than of natural persons belonging to those States. Nor do we see any objection, technical or otherwise, to the parting of two or more States unitedly, in the exercise of their sovereign authority, with such of their respective powers as shall be necessary, in order to confer upon persons, natural or artificial, the franchise or privilege of being a corporation, and with such powers and privileges as they shall deem it proper to grant to them.”¹

Ayliffe says :² “Some have doubted whether a person may be a member of two corporations at one and the same time. Now, in answer hereunto, it is to be observed that there are some colleges or corporations that are subaltern to each other, and are as the whole and a part, or as body and members of the same body, which we call a corporation within a corporation. Thus, in one or two universities each university is divided into colleges as members of the whole body. And in this case a person may be a member of the whole university, and a member of a particular college which is a part of the university ; as a person may be a member of the State, and also of some particular city under that State. And there are some colleges or societies which are unto each other as separate species. And in these it is to be considered whether a person can be in one corporation necessarily, and in another voluntarily. For example : A man is a citizen of London by birth, and thus he is necessarily a member of the corporation of London ; and in this case, certainly, he may be a member of another city or corporation voluntarily. But if it be a question whether he may be in several voluntary colleges or corporations, I answer, that if the institution of one corporation be incompatible to the design and institution of the other for which such other corporation is founded, he cannot be

¹ Bishop v. Brainerd, 28 Conn. 289, per STORRS, C. J. See Hunt v. Kansas Bridge Co., 11 Kans. 412.

² Civ. L. 204.

a member of divers colleges or corporations at the same time. But if the business or institution of one of them be no impediment to the design of the other of them, there is no law which forbids a man to be a member of two colleges at the same time."

§ 6. Difference between a corporation and a partnership.—

A corporation usually consists of a large number of members, and a partnership of but few. Although there may be any number of persons in a partnership, yet in proportion as the number is increased, the operations become unwieldy and inconvenient, which is not the case with respect to a corporation, on account of its legal unity. Both are relations voluntarily assumed, and having for their object the union and co-operation of several persons in the prosecution of some undertaking for pecuniary gain. A corporation is created by means of some legislative act ; while a partnership results from an agreement entered into by two or more persons to contribute money or other property, or skill and labor, to the conduct of certain business, and to share the profit and loss. "Both partnerships and private corporations are conventional, so far as the members are concerned. The difference consists in this: the former are authorized by the general law among natural persons exercising their ordinary powers ; the latter, by special authority, usually if not necessarily emanating from the legislature, conferring extraordinary privileges, among the most prominent of which are concentrated permanent individual existence and operation, with corporate succession of membership, rights, and liabilities."¹ A partnership is always the result of a contract ; but the contract need not be in writing. The law will imply a contract where persons act as partners. A mere agreement, however, to constitute a partnership at some future time, does not make the contracting parties

¹ Thomas v. Dakin, 22 Wend. 110, per COWEN, J.

liable as partners.¹ Community of profit is the criterion by which to ascertain whether a contract is really one of partnership.² Persons may take an interest in the objects to be accomplished by a partnership; may make donations to aid its progress; or may sign their names to subscription papers for the same end, without being liable for debts which other persons may contract in the prosecution of the same purpose.³ In contemplation of law, a partnership is an association the members of which have individual rights and duties; but a corporation is regarded as a united body whose rights and duties are collective. The law only knows a corporation by its corporate name. In this name all its acts are done without a specification of its members; and this determines its continued identity though all of its members should be changed.⁴ On the other hand, in the case of a partnership, where suits are to be prosecuted or defended, real estate conveyed, instruments under seal executed, and perhaps in some other transactions, it is necessary to use the names of all of the partners.⁵ Notwithstanding the partnership be composed of numerous members who reside in different countries, one partner cannot maintain an action for the benefit of all to recover a debt due the firm, although he be the managing partner.⁶

It was said, some years since, that the great distinction in contemplation of law between partnerships and corporations is, "that in the first, the law looks to the individuals of whom the partnership is composed, and knows the partnership no otherwise than as being such a number of in-

¹ *Goldsmith v. Sachs*, 17 Fed. Rep. 726; 8 Sawyer, 110.

² *Hoare v. Dawes*, Douglas, 371; *Coope v. Eyre*, 1 H. Blk. 37; *Waugh v. Carver*, 2 Id. 235; *Finckle v. Stacey*, Sel. Ca. Ch. 9; *Robinson v. Wilkinson*, 3 Price, 538.

³ *Atkins v. Hunt*, 14 N. H. 205. See *Bourne v. Freeth*, 9 B. & C. 632; *Dick-*

inson v. Valpy, 10 Id. 128, per PARKE, B.; *Fox v. Clifton*, 6 Bing. 776; *Howell v. Brodie*, 6 Bing. N. C. 44.

⁴ *Walker's Am. L.* 225.

⁵ *Ibid.* In Ohio, by the act of Feb. 27, 1846, partnerships may sue and be sued in the firm name.

⁶ *Brainerd v. Bertram*, 5 Abb. Pr. N. S. 102.

dividuals ; while in the second, it sees only the creature of the charter, the body corporate, and knows not the individuals. Hence, on a judgment against a corporation, execution can only be levied on the corporate effects ; or supposing a trading corporation to become wholly insolvent, the individual members or proprietors will only lose their stock or shares in the capital of the body corporate, and do not become answerable for the debts in their individual capacities. But it is far otherwise with the members of unincorporated partnerships, who may be made answerable for the debts of the firm, to use a recent expression of the Lord Chancellor, 'to their last shilling and their last acre.'¹ Another writer says, that "although a voluntary society of numerous individuals should unite together by mutual agreement for common purposes, provide a common stock by subscription, and subject themselves to laws of their own creation for the government of their society, yet all this will not entitle them to the privilege of suing and being sued in their social capacity, or protect them from individual liability ; but each member, even though a holder only of a particular share, and chargeable only to a limited amount, according to the articles of agreement, will be liable nevertheless to be sued in his individual capacity by all strangers having demands upon the society at large, in the same manner as if he were a member of an ordinary partnership, to the full amount of those demands, provided the demands are those for which the society at large is properly answerable."² A standard English authority distinguishes be-

¹ George's Views of Existing Laws, etc., 1825, p. 29. In *Liverpool Ins. Co. v. Mass.*, 10 Wall. 556, S. C. *Oliver v. Liverpool Ins. Co.*, 100 Mass. 531, it was objected that the Liverpool and London Life and Fire Insurance Company was a mere partnership, because its members were liable individually for the debts of the company. To this,

MILLER, J., who delivered the opinion, remarked, that "however the law on this subject may be held in England, it is quite certain that the principle of personal liability of the shareholders attaches to a very large proportion of the corporations of this country."

² 3 Stephens' Comm. 181.

tween corporations and partnerships thus : " A corporation, it is true, consists of a number of individuals, but the rights and obligations of these individuals are not the rights and obligations of the fictitious person composed of those individuals ; nor are the rights and obligations of the body corporate exercisable by, or enforceable against, the individual members thereof, either jointly or separately, but only collectively as one fictitious whole. With partnerships the case is otherwise. The members of these do not form a collective whole which is regarded as distinct from the individuals composing it ; nor are they collectively endowed with any capacity of acquiring rights, or incurring obligations. The rights and liabilities of a partnership are the rights and liabilities of the partners, and are enforceable by and against them individually. The fundamental distinction between partnerships and unincorporated companies is, that a partnership consists of a few individuals known to each other, bound together by the ties of friendship and mutual confidence, and who, therefore, are not at liberty, without the consent of all, to retire from the firm and substitute other persons in their places ; whilst a company consists of a larger number of individuals not necessarily acquainted with each other at all, so that it is a matter of comparative indifference whether changes amongst them are effected or not."¹ While men continue to be partners they are regarded as natural persons merely. A corporation aggregate can only act by an agent or attorney either provided for in the act of incorporation, or authorized by

¹ Lindley on Part., 4th Eng. Ed. 4, 5. The courts treat as illegal any association for profit which attempts to arrogate to itself the privileges of a body corporate. *Blundell v. Winsor*, 8 Sim. 601. The creation of transferable shares in a common stock, constitutes assuming to act as a body corporate. *Duvergier v. Fellows*, 5 Bing. 248 ; but

not the making of by-laws. *R. v. Webb*, 14 East. 406. *Contra*, *Josephs v. Pebrer*, 3 B. & C. 639. The adoption of a name necessarily denoting a corporation, is assuming to act as such ; and so is the use of a common seal. *R. v. Whitmarsh*, 14 Q. B. 803 ; *Cooch v. Goodman*, 2 Id. 580.

the corporation to act in its behalf;¹ but in all matters within the scope of partnership dealings, or falling within the ordinary business and transactions of the firm, each partner has the right and power to bind the partnership. By virtue of his relation, he is the general agent of the firm, and can act at once as principal and agent of his copartners; and in the fulfilment of outstanding engagements of the firm, and in the settlement of its business generally, the authority of each member remains the same after as before dissolution.²

¹ Co. Litt. 66 b. But with respect to powers confided to a corporation, the general rule is that they cannot be delegated; and that when the corporation itself is pointed out as the proper functionary to execute a discretionary power, it must be solely exercised by the corporation at meetings held for that purpose. Winsor, *Ex parte*, 3 Story, 411.

² Shirreff v. Wilks, 1 East. 52; Western Stage Co. v. Walker, 2 Clarke, Iowa, 504; Norton v. Thatcher, 8 Neb. 186. When a partnership consists of more than two members, in the absence of an express provision to the contrary, there is an implied understanding that the acts of the majority are to prevail over those of the minority as to all matters within the scope of the common business. Johnston v. Dutton, 27 Ala. 245. Where the firm consists of but two persons, and there is nothing to prevent each from having an equal voice in the direction and control of its affairs, a partner may protect himself against the consequences of a future contract by giving notice of his dissent to the party with whom it is about to be made. *Ibid.*; Gallway v. Mathew, 10 East. 264; Willis v. Dyson, 1 Stark. 164; Vice v. Fleming, 1 T. & Jerv. 227; Leavitt v. Peck, 3 Conn. 125; Feigley v. Sponeberger, 5 Watts & Serg. 564; Monroe v. Conner, 15 Me. 178. So, if the firm

be composed of more than two persons, and one of them dissents, the party with whom the contract is made acts at his peril, and cannot hold the dissenting party liable unless his liability results from the articles, or from the nature of the partnership contract. Johnston v. Dutton, *supra*. Whether it would be deemed a *bona fide* transaction so as to bind the firm, if the majority should wantonly act without notice to or consultation with the minority, *quere*. That it would not, see Story on Part., sec. 123. In Corst v. Harris, Turn. & Russ., Lord ELDON said: "For a majority to say, we do not care what one partner may say, we being the majority, will do what we please, is, I apprehend, what this court will not allow." Where the judge was asked to instruct the jury that the majority of the firm could not, under any circumstances, overrule the minority in the management of the business, and that if one member protested against a sale, his interest would not pass to the purchasers, it was held that the instruction should have been given, with the single qualification that the jury must believe that the majority of the firm, in making the sale, were acting in good faith. Western Stage Co. v. Walker, 2 Clarke, Iowa, 504. If there is no stipulation to the contrary in the partnership articles, a majority of the partners, acting fairly and in good faith,

"As respects the joint property, every member is seized not merely to the extent of his own share, but is possessed of the whole, and has an equal voice in the conduct and management of the business. The power of the whole body resides in every member, each conferring upon the other the right to do whatever he himself may do in furtherance of the common object. Each member being the agent of the whole, has the right of disposing of all or any part of the partnership effects for any purpose falling legitimately within the scope of the object for which they have associated together."¹ One partner may enter upon, use, or otherwise control, all of the common property, real or personal; and he may release and discharge the debts due the firm.² He may assign firm property as a security for antecedent debts as well as for debts thereafter to be contracted on its account; and there are cases which hold that his authority even extends to a transfer or pledge of all of the partnership effects directly to a creditor in payment, or for the security of a debt due from the company, though the tendency and ultimate effect of such a transaction may be to destroy the partnership business.³ Personal

may conduct the partnership business notwithstanding the dissent of the minority. *Ibid.*; *Kirk v. Hodgson*, 3 Johns. Ch. 400; *Collyer on Part.* 105; *Story on Part.*, sec. 125.

¹ *Fisher v. Murray*, 1 E. D. Smith, 341. See *Robinson v. Gilfillan*, 15 Hun, 267.

² *Thomas v. Dakin*, 22 Wend. 9.

³ *Mabbett v. White*, 15 N. Y. (2 Kern.) 442, and cases cited. But the authority of each of several partners as agent of the firm is necessarily limited to transactions within the scope and object of the partnership and in the course of its trade or affairs. See *Welles v. March*, 30 N. Y. 344. It was held by Chief-Justice MARSHALL, in *Anderson v. Tompkins*, 1 Brock,

456, that the right of one partner, without the concurrence of his copartner, to assign the property of the firm to a trustee to pay the partnership debts, results from his general power over the partnership property. On the other hand it has been urged that, under ordinary circumstances, there is nothing in the nature of the contract of partnership from which the assent of the non-executing partner to such a transaction can be implied. *Burrill on Assignments*, ch. 4. In *Ormsbee v. Davis*, 5 R. I. 442, it was held that one partner could not assign the whole property of the firm to a trustee for the benefit of the creditors of the concern, without the prior assent or subsequent ratification of his copartner. In *Welles*

and individual liability is an incident both of partnerships and corporations; uniform and invariable in the former, subject entirely to the legislative will in the latter.¹

The established rule in reference to partnerships is, that every member of the company is liable for all of the debts of the concern;² and that where one of the partners commits a fraud in the course of the partnership business, all of the partners are liable for the injury, though some of them do not concur in the act.³ A partnership is dissoluble, not only by the death or insanity, but by the bankruptcy of a member; the sale by him of all his interest in the partnership effects, or the sale of the same by execution;⁴ his conviction of felony, if it results in his civil death; and the marriage of a partner who is a *feme sole*.⁵ There has

v. March, *supra*, WRIGHT, J., said that it was the exercise of a power without the scope of the partnership enterprise. The more reasonable and just rule would seem to be that while a single partner may not, under ordinary circumstances, without the assent of his copartner, assign the firm property to a trustee for the benefit of creditors, yet if an extraordinary emergency occurs in the affairs of the partnership, and the non-assigning partner cannot be consulted on account of his absence, under circumstances which furnish reasonable ground for inferring that he intended to confer upon the assigning partner to do any act for the firm which could be done with his concurrence if he were present, such an assignment, if fairly made, will be presumed *prima facie* valid. Stein v. La Dow, 13 Minn. 412.

¹ Waterbury v. Union Express Co., 3 Abb. Pr. N. S. 163.

² "If judgment is obtained against the firm for a debt owing by it, the judgment creditor is under no obligation to levy execution against the property of the firm before having recourse to the separate property of the part-

ners; nor is he under any obligation to levy execution against all the partners ratably, but he may select any one or more of them and levy execution upon him or them, until the judgment is satisfied, leaving all questions of contribution to be settled afterward between the partners themselves." Thompson on Liability of Stockholders, quoting from Lindley on Part. 300. Members of corporations are in like manner liable for debts contracted before they have fully completed their corporate organization. Ibid. citing Broyles v. McCoy, 5 Sneed, 602.

³ Story Part. sec. 166. By the Roman law, each partner was only liable to the extent of his own share. Dig. lib. 45, tit. 2, secs. 1 and 2. The French law is the same, except as to partnerships for commercial purposes, in which each partner is liable *in solido*. Pothier, *De Societe*, N. 96, 103, 104.

⁴ Marquand v. N. Y. Mfg. Co., 17 Johns. 525; Nicoll v. Mumford, 4 Johns. Ch. 522; Rodrigues v. Hefferman, 5 Id. 417; Cochran v. Perry, 8 Watts & Serg. 262.

⁵ Nerot v. Bernard, 4 Russ. 247.

been some conflict in the decisions as to whether the concern may be dissolved at any time by the act of a single partner at his own mere pleasure, notwithstanding a provision in the articles of copartnership against a dissolution.¹ Of course where a partnership is formed for no definite period, any partner may withdraw at a moment's notice and dissolve the partnership. The superiority of a corporation over a partnership has been said to consist "in its ability to do all acts in the corporate name without specifying the members; its independence of death or transfer of interest among the members; and the liability of members only to the extent of their respective interests."² A partnership is not "adapted to carry on business which is designed to be permanent, or in which a large number of persons unite, or where changes of membership are expected to take place. The only safe method of prosecuting such business is by means of corporate powers. A corporation is not affected by the decease of one or more of its members, and its shares may be transferred so that existing stockholders may go out and new ones may be admitted without disturbing its business, and with safety to the members."³

¹ *Marquand v. N. Y. Mfg. Co.*, *supra*; *Thomas v. Dakin*, 22 Wend. 9. See Story's Eq. Juris., sec. 668; Story on Part., sec. 275. In *Skinner v. Dayton*, 19 Johns. 513, PLATT, J., said: "Even where partners covenant with each other that the partnership shall continue seven years, either party may dissolve it the next day by proclaiming his determination for the purpose; the only consequence being that he thereby subjects himself to a claim for damages for breach of his covenant." *Contra*, *Crowshay v. Maule*, 1 Swanst. 495; *Peacock v. Peacock*, 16 Ves. 56; *Bishop v. Breckles*, 1 Hoffman Ch. 534; *Pierpont v. Graham*, 4 Wash. C. C. 234. By the Roman law, it was competent for any partner to renounce the part-

nership, whether it was a partnership at will or for a fixed period of time, even although he had expressly stipulated to the contrary, if it was done for a reasonable cause, at a reasonable time, and in a reasonable manner. By the codes of France and Louisiana, and also by the law of Scotland, partnerships, which by the original contract are to continue for a definite period, cannot be dissolved until the expiration of the period, except for some just cause. Story on Part., secs. 273, 274.

² Walker's Am. L. 241.

³ *Tyrrell v. Washburn*, 6 Allen, 466. "Corporate bodies may exist without transferability of the rights of the corporators; for a large majority of our literary and charitable, as well as all of

The transferability of shares is not, however, confined to corporations. Such right of transfer may be contained in articles of partnership, and become a fundamental condition of them. The general rule is the reverse, and it is common to regard transferability as an indication of corporate character.¹ So, although non-dissolution by death or by legal disability is a mark of a corporate body, yet it may be adopted as an article of an ordinary partnership.² And restricted responsibility of members is not wholly confined to corporations. Limited partnerships, which were first introduced in France, are permitted by statute in Alabama, California, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, and Vermont. It is provided that in these partnerships there may be, besides the general partners, one or more special partners who shall put into the concern a certain amount of cash capital, and only be liable to the extent of the amount so furnished.³

our municipal corporations, are so." Verplanck, Senator, in *Warner v. Beers*, 23 Wend. 152.

¹ Ibid.

² Collyer on Part., 5, 648. Where it is apparent from the articles of a trading association, that the association is designed to consist of many members who may from time to time cease to be interested therein by death or by voluntary withdrawal, and that the same business shall be continued in the same manner by those who may remain and by such as may be added to their number, it will be considered that each member agreed to be and remain a partner in the association, notwithstanding changes in others of its members, until such time as he should die or withdraw by some positive act of his own. *Tyrrell v. Washburn*, *supra*.

³ The provisions of the statute of New York on this subject were originally a substantial adoption of the French ordinance of 1673; and those of the States named above, have mainly followed the law of New York. The New York statute (3 Rev. Sts., 7th ed., p. 2234, *et seq.*), which was first passed in 1822, and subsequently from time to time amended, enacts that limited partnerships for the transaction of any mercantile, mechanical, or manufacturing business, or of any other lawful trade or business (but not for the purpose of banking or insurance) within the State, may be formed by two or more persons, to consist of one or more persons to be called general partners who shall be jointly and severally responsible, and of one or more persons who shall contribute in actual cash payments a spe-

§ 7. **Unincorporated associations in general.**—Companies or societies which are not sanctioned expressly by the legislature pursuant to some general or special law, are usually

cific sum as capital to the common stock, called special partners, who shall not be liable for the debts of the partnership beyond the fund contributed by him or them. The general partners only can transact business for the firm, excepting as hereinafter mentioned. Persons proposing to form such partnership must sign a certificate containing the name of the firm; the nature of the business; the names of all of the partners and their places of residence, stating which are general and which are special partners; the amount of capital contributed by each special partner; and the time of the commencement and termination of the partnership. The certificate, after being acknowledged by the several persons signing it in the same manner as conveyances of land, must be filed and recorded in the office of the clerk of the county where the principal place of business of the partnership is situated; and a transcript of the certificate and acknowledgment, certified by the clerk in whose office it is filed, must be filed and recorded in the office of the clerk of every county in which the partnership has a place of business. At the time of filing the original certificate, an affidavit of one or more of the general partners must also be filed in the same office, stating that the sums mentioned in the certificate as having been contributed by each of the special partners have been paid in cash. The partners, when requested, are required to publish in two newspapers in the senate district or city or town in which the business is conducted, to be designated by the clerk of the county, the terms of the partnership for at least six weeks immediately after such registry. In the

same manner every renewal of the partnership must be certified, acknowledged, recorded, and an affidavit filed and notice given. Every alteration in the names of the general partners, in the nature of the business, or in the capital of any of the special partners, and the death of any partner, will work a dissolution of the partnership, unless the articles of partnership specify that in such event the partnership shall be continued by the survivors, in which case it may be continued with the assent of the heirs or legal representatives of the deceased partner. Every such partnership carried on after such alteration or death, is to be deemed a general partnership in respect to subsequent business, unless there is a provision in the articles of partnership for the continuance of the business by the survivors; provided that one or more special partners may be added to the partnership upon paying in an additional amount of capital to be agreed upon by all of the partners, and provided the general partners file an additional certificate with the clerk with whom the original certificate was filed, verified on oath by one of them, stating the names and residences of such additional special partners, and the amount respectively contributed by them. Any special partner, or his heirs or legal representatives, may sell his interest in the partnership, upon filing, within ten days thereafter, a notice with the clerk with whom the original certificate has been filed, and the purchaser will thereupon become a special partner. The business of the partnership must be conducted under a firm in which the names of the general partners only are inserted, except that where there are two or

no more than partnerships.¹ At common law when they are formed for a distinct purpose other than for the sharing of profits or direct pecuniary advantage, "they are not partnerships, but, in the legal effect of their dealings with others, constitute agencies in which the liability of the

more general partners, the firm name may consist of either one or more of such general partners with or without the addition of the words "and company," or "& Co."; and if the name of any special partner is used in the firm name with his privity, he will be deemed a general partner. Unless the partnership put upon some conspicuous place on the outside and in front of the building in which it has its chief place of business, a sign on which is painted, in legible English, all the names in full of the partners, no action will be dismissed by reason of the plaintiff failing to prove the allegations of his pleading as to the names and number of the partners, but the pleadings may be amended in that respect on the trial without costs. Suits in relation to the business of the partnership may be brought by and against the general partners alone. No part of the sum contributed by a special partner to the capital stock can be withdrawn by him, or be paid to him as dividends, profits, or otherwise, during the continuance of the partnership; but any partner may annually receive interest on the sum contributed by him, if the payment of it does not reduce the amount of the capital; and if, after the payment of such interest, any profits remain to be divided, he may also receive his portion of such profits. If, by the payment of interest or profits to a special partner the original capital has been reduced, he will be required to restore the amount requisite to make good his share of capital with interest. A special partner may from time to time ex-

amine into the state and progress of the partnership concerns, and advise as to their management. He may also loan money to, and advance and pay money for, the partnership, and may take and hold the notes, drafts, acceptances, and bonds of or belonging to the partnership, as security for the repayment of such money and interest, and may use and lend his name and credit as security for the partnership in any of its business, and has the same rights and remedies in these respects as any other creditor. He may also negotiate sales, purchases, and other business for the partnership; but no business negotiated by him will be binding on the partnership until approved by a general partner. If he transact any other business on account of the partnership, he will be deemed a general partner. The general partners are liable to account to each other and to the special partners. The partnership cannot be dissolved by the acts of the parties before the time specified in the certificate of its formation or renewal, until a notice of such dissolution has been filed and recorded in the clerk's office in which the original certificate was recorded, and been published once a week for four weeks in a newspaper printed in each of the counties where the partnership has places of business, and in the State paper.

¹ *Wells v. Gates*, 18 Barb. 554; *Lafond v. Deems*, 1 Abb. N. C. 318; *S. C.* 52 How. Pr. 41; *Butterfield v. Beardsley*, 28 Mich. 412; *Moore v. Brink*, 4 Hun, 402; *Tyrrell v. Washburn*, 6 Allen, 466.

members respectively for contracts made by the association, or its committee, depends on the question whether the person by whose act the obligation was contracted was the authorized agent in so doing of the persons sought to be charged."¹ Private associations for private emolument or benevolence confined exclusively to the associates, which are as much private concerns as any other union of individual capital for the exclusive advantage of the contributors, are treated as partnerships.² An unincorporated association formed for the avowed purpose of promoting temperance, friendship, etc., but in reality to retail liquor among the members, was held to be a partnership.³ The Board of Health of the city of New York, as organized under the New York revised statutes, is not a corporation, and it was held that an action could not be maintained against it as such.⁴ The same was held with reference to the Water Commissioners of the city of New York appointed under the act of 1834.⁵ The board of supervisors of a county is not a corporation; and such a board, apart from the county, is not liable to a suit. When a suit is brought against it as representing the county, the county is the real defendant.⁶ "A church primarily is nothing but a voluntary association of persons for religious worship; and for its main and distinctive purpose corporate powers are not important. Indeed the church as such is not usually incorporated; but the corporation is an associate body composed of the congregation who may or may not be religious persons, and who take on corporate powers for convenience in holding and transferring property, entering into contracts, etc. Where

¹ 4 Abb. N. C., *note*; Fleming v. Hector, 2 Mees & Welsb. 172; Todd v. Emly, 8 Id. 505; Matter of St. James's Club, 2 De G. M. & G. 383.

² Beaumont v. Meredith, 3 Ves. & Bea. 180; Thomas v. Ellmaker, Parsons' Sel. Cas. 98; Babb v. Read, 5 Rawle, 151.

³ Rickart v. The People, 79 Ill. 85.

⁴ Gardner v. Board of Health of N. Y., 10 N. Y. 409.

⁵ Appleton v. Water Commissioners of N. Y., 10 N. Y. 409.

⁶ Boyce v. Supervisors of Cayuga, 20 Barb. 294; Brady v. Supervisors of N. Y., 2 Sandf. 460.

there is no incorporation, those who deal with the church must trust for the performance of civil obligations to the honor and good faith of the members. Whereas, in case of incorporation, they would deal with a legal body capable of binding itself.”¹ Where persons united in articles to purchase property and carry on a manufacturing business, and their organization fell short of a corporation under the statute, it was held that they were in legal effect partners, and that the court would recognize and protect their property rights as individuals.² The charter of an incorporated manufacturing company which owned real and personal property having expired, the stockholders entered into an agreement to continue the business, and to constitute one of their number an agent to carry it on, and to do everything pertaining to it. They further agreed individually at all times to furnish money, when called on by their agent, for the purpose of defraying the expenses, and to contribute toward the same *pro rata*, or in proportion to the amount of stock held and owned by each of them in the company. It was held that the agreement constituted a partnership as to third persons, irrespective of any particular arrangement between the partners limiting the right of each to make contracts binding the firm; that the agent being a partner, it followed that he was authorized to draw and accept drafts and make notes in the name of the firm in all matters connected with its business, and that such paper would be valid as against all of the members of the firm in the hands of *bona fide* holders, although the agent might have drawn, accepted, or made it, in fraud of the rights of his partners; and that the fact that the plaintiff had discounted paper for

¹ Meth. Church in Newark v. Clark, 41 Mich. 731, per COOLEY, J.

² Whipple v. Parker, 29 Mich. 369. The grant of a privilege to raise money by a lottery is a mere gratuity and not an act of incorporation; nor is it a

contract. The legislature may repeal the grant, and thereby withdraw the privilege when no rights have been acquired or liabilities incurred under the act. Gregory v. Shelby College, 2 Metc. Ky. 589.

the concern, supposing that the corporation was still in existence, furnished no answer to his claim.¹

In private associations, the majority cannot bind the minority unless it be by special agreement. The members are tenants in common, each having a distinct though undivided interest, and an entire dominion over his own share or proportion of the property, but without any right or power to bind the interest or regulate the enjoyment of the property of the other members.² Sir Edward Coke³ makes a distinction between public and private associations, and thinks that in matters of public concern the voice of the majority should govern, because it is for the public good, and the power is to be more favorably construed than when it is created for private purposes. In Viner's Abridgment⁴ several cases are referred to, making the same distinction, and it is now well settled that in matters of mere private confidence or personal trust or benefit the majority cannot conclude the minority, but that when the power is of a public or general nature, the voice of the

¹ *National Bank of Watertown v. Landon*, 45 N. Y. 410. By the rules of a society "for the protection of trade," the object of which was to watch the progress of measures through Parliament affecting the trade interests, and to protect the members from fraudulent and dishonest practices, a committee had the naming of a printer and stationer to be elected from the members of the society, the defraying of expenses, and the application and disposal of the moneys of the society. It was also provided by the rules that the sum of ten pounds should be left in the secretary's hands to meet the current expenses, but that all orders for the payment of money should be drawn by the secretary upon the treasurer at a committee meeting. The plaintiff was appointed printer and stationer to the society, and shortly afterward paid his

subscription. The defendants, who were members of the committee, passed resolutions for the printing and stationery supplied by the plaintiff. It was held that the plaintiff was not precluded by the rules from suing the defendants, as the rules did not create a partnership between the members of the society, and it was not to be inferred that the plaintiff looked to the fund, and not to the parties who gave the orders. *Caldicott v. Griffiths*, 8 Exch. 898.

² *Livingston v. Lynch*, 4 Johns. Ch. 573. The members of a telegraph company are not partners, but tenants in common of the property and franchises of the company, and the majority cannot bind the minority unless by special agreement. *Irvine v. Forbes*, 11 Barb. 588.

³ *Co. Litt.* 181.

⁴ *Tit. Authority*, B.

majority will control on grounds of public convenience. At common law the only way in which an unincorporated association can be sued is by an action against the members as individuals. A member could not maintain such an action, as it would be an answer to it that the plaintiff was legally interested in each side of the question.¹ When, however, by legislative authority or sanction, an association is formed capable of acting independently of the rules and principles that govern a simple partnership, it is so far clothed with corporate powers, that it may be treated for the purposes of taxation as an artificial body, and becomes subject as such to the jurisdiction of the government under which it undertakes to act and contract in its associated capacity.²

A voluntary association cannot as such hold real estate.³ At common law a community not incorporated cannot purchase and take property in succession. Therefore, a deed of land to trustees *de facto* of an unincorporated religious society conveys no title to the society.⁴ But in case of the subsequent incorporation of the society, the legal title to such property becomes vested in the corporation.⁵ In *Phila. Baptist Assoc. v. Hart*,⁶ the Supreme Court of the United States held that an unincorporated association could not take land by devise to the society, and that a devise of that description could not be executed by a court of equity as a charity at common law. But afterward the same court sustained a bill by the nominal trustees of an unincorporated religious society to protect their right to a lot of land granted for the use of such society by the name of "The German Lutheran Church."⁷

¹ *Schmidt v. Gunther*, 5 Daly, 452; 1 Chitty on Pl., 6th Am. Ed., 45. As to the power of such an association to maintain a suit, see *Mears v. Moulton*, 30 Md. 142.

² *Oliver v. Liverpool & London Ins. Co.*, 100 Mass. 531.

³ *East Haddam Baptist Ch. v. same*, 44 Conn. 259.

⁴ *Bundy v. Birdsall*, 29 Barb. 31.

⁵ *Baptist Church in Hartford v. Witherell*, 3 Paige Ch. 296.

⁶ 4 Wheat. 1.

⁷ *Beatty v. Kurtz*, 2 Pet. 566.

And in a subsequent case a devise was held valid which provided for the vesting of the property in a corporation to be thereafter created.¹

§ 8. Clubs. — Societies which merely constitute the relation of principal and agent so far resemble partnerships that each member is bound by certain acts of the rest in furtherance of the common object.² When goods are ordered by one member of a club for the benefit of all, every member who either concurs in the order or subsequently assents to it, is liable, although the member who ordered the goods is made the debtor in the plaintiff's books, and the bill is sent to him, unless it clearly appear that the plaintiff meant to give credit to that member only.³ A club was formed subject to the following rules: That the entrance fee should be ten guineas, and the annual subscription five guineas; that if the subscription was not paid within a certain limited period the defaulter should cease to be a member; and that all members should discharge their club bills daily, the steward being authorized, in default of payment on request, to refuse to continue to supply them. It was held not a case of partnership, but of principal and agent;

¹ *Inglis v. Sailors' Snug Harbor*, 3 Pet. 114. In Massachusetts it is provided by statute (Genl. Sts., ch. 30, sec. 24) that unincorporated religious societies shall have like power to manage, use, and employ any donation, gift, or grant made to them, according to its terms and conditions, as incorporated societies have by law. If such a society has proceeded so irregularly as not to have a corporate existence, it is still a legal organization entitled to the name it has taken and to hold property given to it to the exclusion of any other religious society afterward incorporated. *Glendale Soc. v. Brown*, 109 Mass. 163. The intent of this statute is to confer upon religious societies

ability to hold parochial property in perpetual succession by means of trustees having corporate powers, and at the same time to leave them untrammelled as far as possible in respect to their peculiar discipline and usages. *Currier v. Trustees*, 109 Mass. 165.

² *Flemyng v. Hector*, 2 Mees & Welsby, 172; *Todd v. Emly*, 7 Id. 427; S. C. 8 Id. 505.

³ *Delauney v. Strickland*, 2 Starkie, 416. Clubs are not partnerships within the meaning of the provisions of the English joint stock companies winding up acts. *Matter of St. James's Club*, 2 De G. M. & G. 383. See *Ingham v. Reform Club*, 12 Phila. 264.

and that the members of the club as such were not liable for debts incurred by the committee for work done or goods furnished for the use of the club, the committee having no authority to pledge the personal credit of the members.¹ The duty of the secretary of a club formed for the purpose of supplying coal to the members, was to receive subscriptions from members and pay the amount to the treasurer, and to write to some merchant, whom the members might select, for an offer to deliver coal to the members' houses, and when the offer was accepted by the club, to prepare a contract for the merchant to sign. The treasurer was to pay the coal merchant upon delivery immediately after receiving an order signed by the secretary and chairman, which order was to be given the Thursday night following each delivery. The plaintiff having made an offer which was accepted, entered into a written agreement with the secretary to deliver at the members' residences one hundred tons, "more or less," and he delivered one hundred and twenty-seven tons, pursuant to directions given by the secretary. When the time for payment arrived, it appeared that the secretary had not paid to the treasurer all the money received by him. The sum in the treasurer's hands, which was paid to the merchant, fell short of the amount due, and an action was brought against a member of the club for the residue. It was held that the member was liable.² It has been held in New York that where a number of persons form a club for social intercourse and pleasure, and assume a name under which they incur liabilities by opening an account, they become jointly liable for any indebtedness thus incurred, and if one of them wishes to avoid personal responsibility by withdrawing from the body, he must notify the creditors of such withdrawal; otherwise, if a creditor continues to furnish in good faith articles such as have been

¹ *Flemyng v. Hector*, *supra*.

² *Cockerell v. Ancompte*, 40 Eng. L. & Eq. 279.

previously purchased for the use of the club, his responsibility will continue upon the same principle that makes retiring partners liable for indebtedness subsequently contracted with former creditors.¹ Certain members of an unincorporated association, known as "The Mutual Pleasure Club," and the assignees of other members, brought an action against a member on an agreement entered into by him with the club. It was held that the plaintiffs had no right of action which they could enforce in their own behalf against the defendant; no number of members short of the whole being competent to sue on a cause of action belonging to the club, and still less could they sue at law another member. The court said that although the association was not strictly a partnership, yet that the rights of the members in the property, and the modes of enforcing such rights, were not materially different from those of partners; that in any agreement made by a contracting party with the association as such, each associate had an interest, but no associate had an interest which he could so transfer as that an action could be maintained by an assignee in his own name against a contractor with the association; that the agreement, the right of action, and the result of an action, were the property of the association as such, and there was no separate ownership by a member save in the residuum.²

§ 9. **Board of brokers.**—Such an organization is not a corporation; nor is it a joint stock company in the sense in which such companies are regarded by the English law, although it may have a large amount of property belonging

¹ *Park v. Spaulding*, 10 Hun, 128. See *Ingham v. Reform Club*, 12 Phila. 264.

² *McMahon v. Ranke*, 47 N. Y. 67, per FOLGER, J. Where it appeared that an unincorporated club had no constitution or by-laws, and that it was designed to provide a club-house for the members to meet for social purposes, it was held liable, in action under the

statute of New York, as a joint stock association. *Ebbinghausen v. Worth Club*, 4 Abb. N. C. 300. As to the right to expel a member from the club, see *Hopkinson v. Marquis of Exeter*, L. R. 5, Eq. 63; *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670; *State v. Williams*, 75 N. C. 134; *People v. Board of Trade*, 80 Ill. 134.

to it in a joint or aggregate capacity ; nor is it a partnership as between the members, whatever may be their relations to third persons. It may be defined a voluntary association of persons who, for convenience in transactions with each other, have united to provide a common place for the conduct of their individual business, agreeing among themselves to pay the expenses incident to the support of the objects of the association, in which each for himself, at stated hours of the day, and for his individual profit, may enter into separate engagements with his fellow-members. The board does not share in the losses of the individual associates, but each member takes his own gains, and sustains the losses incident to his engagements. It has some elements in common with corporations, joint stock companies, and partnerships ; such as association, and regulations adopted by it for that purpose.¹ The constitution of a stock and exchange board provided that in sales of seats for account of delinquent members, the proceeds should be applied to the benefit of the members of the board exclusive of outside creditors, unless there should be a balance after the payment of the claims of the members in full. It was held not contrary to public policy ; the authorities to the contrary relating to cases where a man imposes such a direction or incumbrance on his own property which impedes creditors.²

§ 10. Joint stock companies.—An incorporated joint stock company has been described as an association of persons having a joint stock divided into a large number of shares, governed strictly as to its powers, rights, duties,

¹ *Leech v. Harris*, 2 Brewster, Pa. 571 ; *White v. Brownell*, 2 Daly, 329 ; 3 Abb. Pr. N. S. 318. The Open Board of Brokers of the city of New York was organized in the year 1864 by the voluntary association of seventy-seven persons, who, for convenience in the transaction of business with each other, adopted a constitution and by-laws,

making provision therein for a room for the use of the board ; for the election of a president and other officers ; for the formation of an executive committee, a committee of membership, a committee of arbitration, and a board of appeals ; and for the election of new members.

² *Hyde v. Woods*, 94 U. S. (4 Otto), 523.

interests, and responsibilities by the terms of its instrument of incorporation, the shareholders in which are not individually liable in their private capacities for the acts or contracts of the officers or the members of the corporation. Such incorporated joint stock companies have, unless otherwise provided by law, certain rights and powers, such as : to have perpetual succession ; to sue or be sued, implead or be impleaded, grant or receive by their corporate name, and do all other acts as natural persons may ; to purchase and hold land for the benefit of themselves and their successors ; to have a common seal ; and to make by-laws.¹ The immediate superintendence of the affairs of the company is delegated to a portion of the members called directors, subject nevertheless to the general control of the shareholders assembled at stated intervals, or on particular occasions, when they may be convened. The general body of shareholders, therefore, except upon such occasions, unlike the members of a partnership, have no power to interfere with the concerns of the company or to bind it.² These institutions, when not incorporated, have been variously defined with some divergence of expression. While on the one hand it has been stated that they were invented to obviate the consequences of an ordinary partnership,³ on the other it has been said that in the absence of any special law they are mere partnerships, and in general governed by the same rules ; that if one of the members dies, the creditor must proceed against the surviving members before an action can be maintained against the representatives of the deceased ;⁴ and that, although the stock is usually divided

¹ Wordsworth on Joint Stock Companies, 4. See *Maltz v. Am. Express Co.*, 1 Flippin, 611 ; *Boston & Alb. R.R. Co. v. Pearson*, 128 Mass. 445.

² *Smith's Merc. L. 9*, Eng. Ed. 56.

³ *Baird's Case*, L. R. 5, Ch. 725.

⁴ *Moore v. Brink*, 4 Hun, 402. "An unincorporated joint stock company is

a mere partnership, and each member is liable for its debts." *Frost v. Walker*, 60 Me. 468. See *Atty. Genl. v. Mercantile Ins. Co.*, 121 Mass. 524 ; *Boston, etc., R.R. Co. v. Pearson*, 128 Id. 445 ; *Factors, etc., Ins. Co. v. Harbor, etc., Co.*, 37 La. Ann. 233 ; *Wells v. Gates*, 18 Barb. 554 ; *White v.*

into shares transferable by assignment or delivery, and the business conducted by a board of trustees or directors, yet that a stipulation in the articles limiting the responsibility of the members to the joint funds will not operate to prevent the general liability of all of the members for all of the debts.¹ The most correct view that can be taken of these bodies is that they are intermediate between corporations known to the common law and ordinary partnerships, and partake of the nature of both. "They are not pure partnerships, for their members are recognized as an aggregate body; nor are they pure corporations, for their members are more or less liable to contribute to the debts of the collective whole."²

In *Baird's Case*,³ JAMES, L. J., said: "A joint stock company is not an agreement between a great many persons that they will be copartners, but is an agreement between the owners of shares, or the owners of stock, that they or their duly recognized assigns, the owners of shares for the time being, whoever they may be, shall be and continue an association together, sharing profits and bearing losses. No shareholder in a joint stock company is, in the legal sense of the word, any more a partner than the owner of bank stock is; he may not have the same limit of liability, but in every other respect he is the same; he has the same right to take part in public meetings of the body, he has the same right to elect or remove directors, he has the same

Brownell, 4 Daly, 162; *Bray v. Farwell*, 81 N. Y. 600; *Cox v. Bodfish*, 35 Me. 302.

¹ *Walburn v. Ingilby*, 1 M. & K., 51, 76; *Blundell v. Winsor*, 8 Sim. 601; *Greenwood's Case*, 23 Eng. L. and Eq. 422; *Peel v. Thomas*, 29 Id. 276. *Burrill (L. Dict.)* characterizes a joint stock company as a partnership consisting of numerous members who act under articles of association or a deed of settlement, with a capital di-

vided into shares which may be transferred without the express consent of the copartners; while *Bouvier (L. Dict.)* says that in England it is a *quasi* corporation; the association continuing, notwithstanding the death, bankruptcy, or sale by a partner of his share.

² *Lindley on Part.*, 2d Ed. 6; *Moore v. Brink*, *supra*. 4 M. & W. 402

³ L. R. 5, Ch. 725.

right to vote for or against the resolutions of the body, he has the same right to such dividends as may be declared, and he has the same right to dispose of his share as a separate and distinct piece of property, and no other rights in or over the association, its assets, or its transactions; and if he is liable under any contract or obligation, or in respect of any act of the body, it is not because they are contracts, obligations, or acts of his partners or partner, but because they are the contracts, obligations, and acts of the *quasi* body corporate (under present legislation, the actual body corporate) by its properly constituted agents. It may be, and generally is, no doubt, that the agents, the directors, are shareholders, and in that sense partners; but it is certain that there may be a board of directors perfectly competent to bind the whole body, although every one of them may have disqualified himself by parting with every share. The presumption is that the death of a shareholder makes not the slightest difference either in right or liability; that the executor of a deceased shareholder, who succeeds in point of property to the share, takes it (of course in his executorial character) on exactly the same terms and conditions as every other owner of a share."

In England joint stock companies, before the passage of enactments for their regulation granting them privileges and powers, and imposing upon them rules and obligations, were virtually mere partnerships. The large number of the members composing these companies finally compelled them to adopt certain regulations for their government, contained in an instrument called a deed of settlement. This constitutes trustees of the partnership property, directors of the partnership affairs, auditors of its accounts, and such officers as the objects of the association require, and contains covenants for the performance of their respective duties which are specifically set out, as also are those of the other partners or shareholders. It also defines

the number of shares, the power and method of transferring them, and of calling for the instalments required thereon; the mode of convening general meetings of proprietors, their rights when convened, and a variety of other rules suited to the exigencies of the particular undertaking. As far as the provisions of this instrument extend, it is the law by which the partnership affairs are to be governed. When it is silent, the general law of partnership is followed.¹

Unincorporated joint stock companies, as they exist in the United States, with the exception, perhaps, of those organized under the statutes of New York, are merely partnerships, and are in general subject to all the rules governing that branch of the law.² The principal difference between such companies and partnerships relates to the effect of a transfer of a member's interest in not working a dissolution of the company. The fact that the members call themselves stockholders, and the firm an association, and that there are a great many members, does not change the nature of the company.³ Certain persons entered into an

¹ Smith's Mercantile Law, 9th Eng. Ed. 56. An English joint stock company is not, like an ordinary partnership, bound by the acts of any individual member. Burnes v. Pennell, 2 House of Lds. Cases, 497.

² Some of the New York cases so regard them. *La Fond v. Deems*, 52 How. Pr. 41; 1 Abb. N. C. 318; *Wells v. Gates*, 18 Barb. 554; *Dennis v. Kennedy*, 19 Id. 517; *Moore v. Brink*, 4 Hun, 402. Other cases consider them as substantially corporations. *Waterbury v. Merchants' Union Express Co.*, 50 Barb. 157; 3 Abb. Pr. N. S. 163; *Westcott v. Fargo*, 61 N. Y. 542; *Sandford v. Supervisors of N. Y.*, 15 How. Pr. 172. See *Fargo v. Louisville, etc., R.R. Co.*, 13 Chicago Legal News, 277; *Habricht v. Pemberton*, 4 Sandf. 658. In Massachusetts, such

New York companies are deemed mere partnerships. *Taft v. Ward*, 106 Mass. 518; S. C. 111 Id. 518; *Gott v. Dinsmore*, Ib. 45.

³ *Babb v. Reed*, 5 Rawle, 151; *Kramer v. Arthur*, 7 Pa. St. 165; *Hedge's Appeal*, 63 Id. 273; *Hess v. Werts*, 4 Serg. & Rawle, 356; *Tenney v. N. E. Protective Union*, 37 Vt. 64; *Vigers v. Sainet*, 13 La. 300; *Manning v. Gasharie*, 27 Ind. 399; *Robbins v. Butler*, 24 Ill. 387; *In re Fry*, 4 Phila. 129; *Tappan v. Bailey*, 4 Metc. 535; *McGeary v. Chandler*, 58 Me. 537; *Williams v. Bank of Mich.*, 7 Wend. 539, 542; *Townsend v. Goewey*, 19 Id. 424; *Nat. Bank v. Van Derwerker*, 74 N. Y. 234; *Liverpool Ins. Co. v. Mass.*, 10 Wall. 566; *School Dist. v. Ins. Co.*, 103 U. S. 707.

agreement under their hands and seals to form an association for trading and mining in California, by which each person was to have one share for every five hundred dollars subscribed, the capital to consist of eighty shares, transferable certificates of which were to be issued. The constitution of the association provided for a choice of officers, and that the president and directors should have the exclusive direction and arrangement of all the concerns of the company and treasury department. No one could become a member without subscribing and sealing the indenture, or obtaining a certificate of stock directly from the officers, or by transfer. Two classes of stockholders were provided for: those who owned stock without engaging to render any personal service; and those who agreed to go to California and devote their personal services exclusively for the benefit of the company, for which each was to have one additional share; but there was no provision that a person who was not an owner of stock could become so by rendering such personal service. It was held that the association was not, strictly speaking, a partnership. If the members had been copartners, each individual could have disposed of the whole property. No one, not even all of the members, not being directors, could have done this.¹ If there is nothing in the constitution of a joint stock association which regulates the remedies of the shareholders as between themselves, the general law of partnership must prevail. Therefore, in such case, if certain of the shareholders sell goods to the company, they cannot maintain an action against it therefor until after a final settlement of the partnership accounts.² Where the members of such an association embarked in an undertaking for their common profit to be sustained by money advanced by each, it was held that their relation and position were such as to justify a court of equity, in order to settle their disputes respecting

¹ Bullard v. Kinney, 10 Cal. 60.

² Cox v. Bodfish, 35 Me. 302.

the distribution of the common fund, to treat them as partners.¹ The rule that one partner cannot bring an action at law against his copartners, as applied to large, unincorporated joint stock companies, has been avoided in England by having a public officer represent the company, who may sue and be sued in behalf of the members. Such an officer must be created by law, as the members could not, by their own act, empower their treasurer or secretary to represent the firm, and to sue and be sued in its own behalf.² In New York, the statute of 1849 provided that any joint stock company or association consisting of seven or more shareholders or associates, might sue or be sued in the name of the president or treasurer for the time being; and the statute of 1851 extended the provision to any company or association composed of not less than seven persons who were owners, or who had an interest in any property, right of action, or demand, jointly or in common, or who might be liable to any action on account of such ownership or interest. The intent of these statutes was to obviate the inconvenience of joining all the shareholders or associates as parties.³ The company may hold real estate in the name of its president and his successors, and he may sell and convey free from any claim against any of the shareholders, or of any person claiming under them.⁴ Certificates of stock can be sold and transferred by indorse-

¹ *Butterfield v. Beardsley*, 28 Mich. 412.

² See *Lindley on Part.*, 720; *Lawrence v. Wynn*, 5 M. & W. 355; *Skinner v. Lambert*, 4 Man. & Gr. 477; *Wills v. Sutherland*, 4 Exch. 211; *Chapman v. Milvain*, 5 Id. 61; *Reddish v. Pinnock*, 10 Id. 213; *Harrison v. Brown*, 5 De G. & S. 728.

³ *Corning v. Greene*, 23 Barb. 33; *Fargo v. McVickar*, 55 Id. 437. There are similar statutes in West Virginia and Alabama. Code of West Va. of

1868, p. 394; Code of Ala. of 1876, p. 149, sec. 13.

⁴ See *Westcott v. Fargo*, 61 N. Y. 542; *Shaw v. Cock*, 12 Hun, 173; *Saltsman v. Shults*, 14 Id. 256. In New York there need not be a subscription in writing to a joint stock company by members. The statute requires no greater formalities in that respect, for the formation of such associations, than for the formation of ordinary partnerships. *Nat. Bank v. Vanderwerker*, 74 N. Y. 234. Until execution is issued

ment.¹ The management is confided to a board of trustees, or some other authority named in the articles, which prescribe the duration of the company. A shareholder has no right of control, except such as he exercises in the choice of managers; and this right is not, as in the case of a partnership, equal to that of every other member, but only equal to the amount of stock owned by him.² In conclusion, it may be stated that in New York joint stock companies possess the following attributes. 1st. They can sue and be sued in a single collective name—to wit, the name of their president or treasurer. 2d. Their property or capital is represented in shares or certificates of stock, differing

against the company and returned unsatisfied, no action can be maintained against individual members. *Waterbury v. Merchants' Union Express Co.*, 50 Barb. 157; 3 Abb. Pr. N. S. 163; *Robins v. Wells*, 1 Robertson, 666.

¹ There may be membership in a joint stock company without a certificate of stock. *Farrar v. Walker*, 3 Dillon, 506.

² *Waterbury v. Merchants' Union Express Co.*, *supra*, per BARNARD, J. In New York it is provided by statute that "whenever, in pursuance of its articles of association, the property of any joint stock association is represented by shares of stock, it may be lawful for said associations to provide, by their articles of association, that the death of any stockholder, or the assignment of his stock, shall not work a dissolution of the association, but it shall continue as before; nor shall such company be dissolved, except by judgment of a court, for fraud in its management, or other good cause to such court shown, or in pursuance of its articles of association. Said association may also, by said articles of association, provide that the shareholders may devolve upon any three or more of the partners the sole management of their business. This

act shall in no court be construed to give said associations any rights or privileges as corporations. It shall be lawful for any joint stock company or association to purchase, hold, and convey real estate for the following purposes: 1. Such as shall be necessary for its immediate accommodation in the convenient transaction of its business; or, 2. Such as shall be mortgaged to it in good faith by way of security for loans made by, or moneys due to, such joint stock company or association; or, 3. Such as it shall purchase at sales under judgments, decrees, or mortgages held by such joint stock company or association. The said joint stock company or association shall not purchase, hold, or convey real estate in any other case, or for any other purpose; and all conveyances of such real estate shall be made to the president of such joint stock company or association as such president; and who and his successors from time to time may sell, assign, and convey the same free from any claim thereon against any of the shareholders, or any person claiming under any or either of them." N. Y. Rev. Sts., 7th ed., vol. 2, 1543, 1544.

in no respect from shares and stock certificates in corporations. 3d. The death or insolvency of a member or the sale or transfer of his interest, does not dissolve the company. 4th. They have perpetual succession. 5th. They can take and hold real and personal property in a collective capacity, and in perpetual succession.¹ In Massachusetts the phrases joint stock companies and corporations, organized under general laws, as used in all of the statutes of that State from 1851 to 1871 inclusive, are convertible terms, and refer to the same class of corporations as distinguished from those established under special charters.²

§ 11. History of corporations.—According to Plutarch, corporations, which it is claimed by some were invented by the Romans, were introduced in Rome by Numa, who subdivided the two rival factions of Sabines and Romans and instituted separate societies of every manual trade and profession. By the civil law they were called *universitates*, as forming one whole out of many individuals; or *collegia*, from being gathered together; and were adopted by the canon law for the maintenance of ecclesiastical discipline.³ Bodies politic and corporate are known to have existed as

¹ The New York Constitution, article 8, sec. 3, provides that the term corporation, as used therein, shall be construed to include all associations and joint stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships.

² Atty. Genl. v. Mercantile Ins. Co., 121 Mass. 524. But see Taft v. Ward, 106 Mass. 518; Bodwell v. Eastman, Ibid. 525; Boston & Alb. R.R. Co. v. Pearson, 128 Id. 445; Tappan v. Bailey, 4 Metc. 529. Where parties entered into an agreement to purchase and run a ferry-boat, to be owned by them in proportion to the amounts of their subscriptions, the money received from the ferry to be divided among them *pro*

rata, each subscriber to be entitled to sell his stock, the purchaser to be vested with all of the rights of an original subscriber, and the association to last as long as the majority of the subscribers should determine, it was held that they were partners. Whitman v. Porter, 107 Mass. 522. One holder of shares in a joint stock company cannot maintain an action against another member who has possession of the property of the company, for the custody of his proportion of such property. Whitehouse v. Sprague, 7 Atlantic Rep. 17.

³ 1 Blk. Com. 468, 469; Browne Civ. L. 141, 142. The term college or university was applicable to every kind of corporation. Ibid.

far back at least as the time of Cicero ; and Gaius traces them even to the laws of Solon of Athens some five hundred years previous, which allowed the formation of companies at pleasure provided they did nothing contrary to public law.¹ In the Digest it is said : “ But those who are

¹ 2 Kent's Com., 9th ed. 307. “Blackstone gives the honor of the invention to Rome ; Dr. Ayliffe to Athens and to Solon. The latter, I think, is right ; and the Pandects seem to confess it.” Browne Civ. L. 141, *note*. Ayliffe (Civ. L. 196, 197) says : “ Colleges had their first rise and original from the Greek law of Solon, and as such they may make laws and statutes among themselves.” “ The Grecian youth who attended the schools of philosophy and rhetoric listened to teachers not authorized by the State, nor formed into corporate bodies on a public foundation. . . . The State sometimes encouraged the philosopher so far as to give him an assigned and fixed seat of instruction, as the Academy to Plato, and the Lyceum to Aristotle. But their disciples did not obtain in consequence of their attendance any privileges similar to those of graduation with us ; nor was the course of study made a necessary preparative to any profession. . . . At Rome in the time of the emperors, the professors in different sciences began to receive regular stipends out of the public treasury, to be authorized by the State, and to become subject to regulations and a form of discipline. Constantine, Theodosius, and Justinian seem to have been the chief promoters of these plans. The institutions for the purpose of teaching the laws, in particular, begin from the third century to offer an appearance somewhat resembling modern colleges. Students of the legal schools of Rome, Constantinople, and Berytus went through a course which lasted

five years and were divided into five several classes, with distinguishing names to each. During the first, or freshman year, they were called *dupondii*, a name intimating that they were yet of no value ; in the second year they read the edicts, and were called *edictals* ; in the third, *papinianists*, their study being Papinian's works ; in the fourth, *lutoi*, from *luein*, as having a power to answer questions like our bachelors ; in the fifth, *alutoi*. In the 11th book of the Code, tit. 18, it appears that no persons, under pain of infamy and banishment, were permitted by law to teach as public professors (though they might as private preceptors in private houses), unless established by government, and that the government had established in the capitol a foundation of public professorships, viz. : one of philosophy ; two of law ; three of Latin ; professorships of rhetoric ; four of grammar ; five Greek professors of logic, and four of grammar, who could not teach privately, under the same penalties of exile and infamy. The honors and privileges bestowed in consequence of proficiency in science, are everywhere to be found in the Justinian law. The professors and students were exempt from civil offices and from the reception of strangers ; no noisy trade could be carried on near these seminaries, which were usually called *auditories* ; they were free from all ordinary taxes ; and after twenty years' (some say thirty) honorable exercise of their profession were entitled to the rank of count or *comes*, an honor the nature and degree

permitted to form themselves into a body under the name of a corporation, society, or other community, have within their peculiar jurisdiction, as in the similar case of the republic, property in common, a common chest or treasury, and an agent or head of the corporation or society by whom, as in the republic, whatever is necessary to be done for the benefit of the community may be transacted.”¹ It is said that college (*collegium*), or the union of several persons for a common purpose, was by the Roman law a corporation for religious, political, and industrial purposes. There were, “from the time of Numa, or Servius Tullius, colleges of artificers, carpenters, butchers, bakers, locksmiths, potters, and, finally, of persons engaged in nearly every other branch of industry. Their original design was either to bring the old and new citizens into closer union, or, according to Plutarch, to prevent the danger of a general conspiracy, by organizing separate assemblies, festivals, and finances, for different portions of the citizens.”² During the latter period of the republic they were suspected of being centres of in-

of which is not clear, counts, or *comites imperatoris*, being very various in station, power, and honor. . . . There was at Constantinople, besides a college for the study of the law, one for the liberal arts; and both there and at Alexandria were celebrated colleges of physicians.” Browne’s Civ. L. 152, 164. Special merit is due to the civil law for the advancement and encouragement of seminaries of learning, “for it was at first owing to that inordinate and universal passion which seized mankind, after the discovery of the Pandects at Amalifi, for the study of the law, that such members flocked to the universities where it was taught. The objects of study in these revered communities were divided into four branches: divinity, law, and physics composed three of these; and the arts and sciences cemented under one head

formed a fourth. The power or faculty of teaching these was bestowed by the State to the seminary; by the seminary to the individual, and hence in process of time these branches of learning came to be called *faculties*; and the criterion or essential difference of a university was the power and license of teaching the four faculties the supposed compass of universal knowledge.” Ibid. 152, *note*.

¹ Dig., lib. 3, tit. 4.

² New Am. Cycl., tit. *College*. A writer in the same work, however, under the head of *Corporation*, suggests that the alleged division of the citizens of Rome into separate societies, according to their trades, as alleged by Plutarch, is probably fabulous, and says that, even if authentic, it was a mere classification of the people without any of the essential incidents of a corporation. He

trigue, and the senate ordered the dissolution of those that had been newly formed. They were revived during the civil wars, and afterward suppressed, first by Cæsar and then by Augustus, but seem to have been encouraged in the Byzantine empire.¹ The communities styled perpetual, were distinct from those societies or communities which the civil law treated under the title of society or partnership; these last being for the interests of particular men, without any necessary foundation on the sovereign authority, and were only for a certain time, or at least only for the life of the persons thus associated. "There were several perpetual corporations at Rome which were either confirmed by the decrees of the senate, or else by imperial constitutions."² The Romans had no notion of sole corporations. With them, the number three was requisite, though a corporation originally consisting of three persons, might still subsist when reduced to one.³

In England the legal principles on the subject were borrowed chiefly from the Roman law, and from the policy of the municipal corporations established in Britain and the other Roman colonies; the powers, capacities, and incapacities of corporations under the English law very much resembling those under the civil law. The most ancient secular corporations established directly by the king's charter were guilds or incorporated companies of merchants, traders, and artisans; and the practice of incorporating towns by charter was probably introduced in imitation of these com-

thinks that "the true original of corporations is to be found in the middle ages, when cities, towns, fraternities of tradesmen, and the like, obtained charters from feudal sovereigns of certain privileges and immunities, sometimes for the protection of personal liberty, and sometimes for the advantage of trade, the latter being in the nature of a monopoly."

¹ Ibid.

² Ayliffe, Civ. L. 196.

³ 1 Blk. Com. 469; Wood, Civ. L. 135; Edinburgh Encycl., tit. *Corporation*. Ayliffe (Civ. L. 205) says: "Though all the persons of a body politic be changed, yet the corporation still remains the same; yea, if there be but one person remaining of the whole corporation, the name and right of the corporation are preserved in that one person, though a corporation cannot at first consist of one person."

panies. Among other franchises conferred on the inhabitants of towns by ancient charters was frequently that they should have *gildam mercatorium*, or a merchant guild, which constituted them a corporate body, *gilda* signifying an incorporate brotherhood or company; for which reason the place of their meeting was called the guild hall. Sir Edward Coke mentions that he had seen a charter made by Henry I. to the weavers of London, by which the king granted to them that they should have *gildam mercatorium*; and a confirmation of it by Henry II.¹ In Molloy's

¹ 10 Co. 30, *a. b.*; 1 Rol. 513; Kyd on Corp. 63. "During the latter part of the Saxon period, and for some time after the Conquest, the great nobles claimed and exercised prerogatives within their own demesnes, similar to those which the king exercised within those of the crown; and of these it is certain that the power of conferring corporate privileges on their towns was one. There are many instances of towns within the demesnes of the feudal barons which had enjoyed such privileges by charters from their immediate lords, and having come to the crown by escheat, have had these privileges confirmed and others added to them by frequent charters from the king. The whole history of the incorporation of towns in every country in Europe proves that the king did not exclusively possess this prerogative. The inhabitants were originally the tenants or dependents either of the king, or of some particular nobleman on whose demesne they resided, and the superior, whether king or lord, exacted from them not only a rent for the lands which they possessed, but various tolls and duties for the goods which they exchanged with their neighbors. These exactions, which had at first been precarious, were gradually ascertained and fixed either by long custom, or by express regula-

tions. But as, on the one hand, many artifices had frequently been practised in order to elude the payment of those duties, and as, on the other hand, the persons employed in levying them were often guilty of oppression, the inhabitants of particular towns, on their increasing in wealth, were induced to make a bargain with the superior by which they undertook to pay a certain yearly rent in the room of all his occasional demands; and these pecuniary compositions being found expedient for both parties, were gradually extended to a longer period, and at last rendered perpetual. An agreement of this kind seemed to have suggested the first idea of a borough considered as a corporation. Some of the principal inhabitants of a town undertook to pay the superior yearly rent, in consideration of which they were permitted to levy the old duties, and became responsible for the funds committed to their care. As managers of the community, therefore, they were bound to fulfil its obligations to the superior, and by a natural extension of the same principle it came to be understood that they might be prosecuted for all its debts; as on the other hand, they obtained, of course, a right of prosecuting all its debtors. The society was thus viewed in the light of a body politic or fictitious person capable

Maritime Law¹ it is said: "To engage persons of rank and fortune in trade, that industrious nation, the Burgundians, procured the association or incorporation by John, Duke of Brabant, of the ancient company of The Adventurers, in the year 1248, which was then called The Brotherhood of St. Thomas à Becket of Canterbury, which, being afterward translated into England, was by Edward the Third confirmed, and by his successors, Henry the Fourth, Henry the Fifth, Edward the Fourth, Henry the Sixth, Richard the Third, and King Henry the Seventh, who gave them the name of Merchant Adventurers; and from him successively hath their charter been confirmed down to and by his late sacred majesty, King George the Second. And as this society is of ancient estimation, so is their government very commendable." The East India Company was incorporated in 1599.²

It is said that the first appearance in England in any document of the terms *corporation* and *incorporation* was early in the 15th century, in the reign of Henry the Fourth.³ Col-

of legal deeds, and of executing every sort of transaction by means of trustees or guardians. . . . That the king, however, was very soon after the Conquest understood to possess the exclusive prerogative of erecting guilds or incorporate companies, appears from this circumstance, that many such companies were suppressed about that period, as *adulterine* guilds, that is, guilds set up without the king's warrant or authority. In the time of Bracton, who lived in the reigns of Henry the Third and Edward the First, the king's prerogative as to the exclusive right of granting liberties and franchises in general, seems to have been fully established; and the absolute necessity of his assent to the erection of any corporation, was held in the reign of Edward the Third to have been long

settled as clear law." 1 Kyd on Corp. 42, 43, 44.

¹ Vol. 2, pp. 311, 312.

² Ibid.

³ "Private corporations for commercial purposes have been known as long at least as the institution of the civil law; but it has been reserved to our own times to see them so enlarged and multiplied as to engross to themselves almost exclusively many of the most important branches of industry and commerce. The advancement of the arts and sciences, and of the wants of men, has opened up so many new and important means for the benefit of mankind which cannot, from their nature, be accomplished by individual resources and skill, that the aggregation of capital and a combination of energies have been found indispensable to

leges and universities began to assume their present form upon the revival of letters in Europe. The time has been put as late as the 13th century, when first occurs some obscure mention of academical degrees; though their origin has been attributed to Peter Lombard at Paris, and Gratian at Bologna, the former of whom lived in the 11th, and the latter in the 12th century. It is not improbable that "during those two centuries they might have been undergoing a gradual change from common schools in cathedrals and monasteries, where for the most part grammar only was taught, to colleges in the 13th century, when they began to confer degrees. There were at Oxford, as early as the ninth century, numerous students and professors who read lectures in grammar, rhetoric, divinity, philosophy, arithmetic, geometry, and astronomy; but the school was not founded or endowed, or furnished with power to bestow public distinctions on learning."¹

Business similar to what is now known as banking is claimed to have been exercised in the reign of Sennacherib seven hundred years before the Christian era. In the New York Metropolitan Museum there are Babylonian tablets containing records of such transactions, the earliest tablet being of the year 601 B.C.² The term bank, from the Italian *banco*, a bench, is said to have originated from the practice of Jews in the towns of Italy to lend money seated

the accomplishment of objects never before thought of, and which so evidently mark the rapidly advancing civilization of the present age. Formerly the ends to be accomplished for the good of society rarely required the combination of the capital and skill of many individuals, and but few private corporations were created, and these cut so small a comparative figure in the destinies of States, that they attracted but little attention on the part of the law-makers, and were little studied by the

courts." CATON, C. J., in St. Louis, Alton & Chicago R.R. Co. v. Dalby, 19 Ill. 353.

¹ Brown's Civ. L. 151, 152, *note*. "The title bachelor, *baccalaureus*, from *bacca lauri*, military order, or knight bachelor, sometimes meant a young cavalier who had served one campaign, and who might be said to have arrived at the first step or degree of arms." Ibid. 154, *note*.

² Library of Useful Knowledge, vol. 2, p. 186.

on benches in the public market. The Chamber of Loans, the first regular banking establishment known in Europe, was created at Venice, about the middle of the 12th century, to relieve the embarrassed finances of the republic caused by expensive wars. This institution, the plan of which was gradually improved, afterward became the celebrated Bank of Venice, and it remained in existence until the destruction of the republic in 1797. It always maintained a high character in Europe, and during two centuries and a half was unrivalled. In 1401 a bank, called "The Table of Exchange," was established in the city of Barcelona. Six years later the Chamber of St. George, or Bank of Genoa, was organized; and on the 31st of January, 1609, The Bank of Amsterdam. The Bank of Hamburg was created in 1619; The Bank of Rotterdam in 1635; and The Bank of Stockholm in 1688. The Bank of England, which was projected by William Paterson, a native of Dumfries-shire in Scotland, on the model of the Bank of Genoa, was established in 1694, pursuant to an act of Parliament¹ which authorized their majesties to grant a commission to take subscriptions from individuals and to incorporate them.² A bank was not established in Paris until 1716.³

In England, "the first class of joint stock companies subject to distinct legislative enactment were joint stock banks of issue beyond the distance of sixty-five miles from London; and subsequently all joint stock banking companies consisting of more than six persons established after May 5th, 1844, were regulated by an act passed in that year. This measure continued in force until 1857, when a statute was passed subjecting companies formed under the last mentioned act, and any new companies, with some

¹ 5 William & Mary, ch. 20.

² See argument of counsel in *People v. Utica Ins. Co.*, 15 Johns. 367.

³ *Edinburgh Encycl.*, tit. *Bank*.

slight modifications, to the regulations ordained for other companies by the joint stock companies' act. In the following year, joint stock banks were permitted to register with limited liability, a privilege previously withheld from them. Banking companies registered under the act of 1857 are now registered under the companies' act; and all joint stock banks formed since November 2d, 1862, consisting of more than ten persons, must be formed and registered under its provisions, unless established under a special act or letters patent."¹

¹ Smith's Mercantile L., 9th Eng. Ed. 57. Amendatory acts were passed in 1867, 1877, and 1879. In *Van Sandam v. Moore*, 1 Russ. Ch. 441, which was tried in 1826, Chancellor ELDON, in commenting upon the legal history of joint stock companies, and on the provisions which had been introduced into acts of Parliament creating or regulating such companies in order to give effect to legal proceedings to which they were parties, said: "It is quite clear that in a commercial country like this there may be many undertakings and enterprises to which individual powers of mind or purse may be quite unequal; and for such cases the constitution of the country has provided by giving the means of creating corporations. It is within my own memory that, when an application was made to Parliament to incorporate bodies, it was generally met with this short answer: 'Why have you not gone to the Crown with your requests? why have you not obtained a charter?' However, that mode of thinking has gone by, and several acts of Parliament have been passed establishing companies similar to this one. There were not many of those acts passed before inconveniences were found to follow. If a man had occasion to bring an action against one of the bodies so constituted, he did not

know how to proceed, or against whom to bring his suit; and if he brought it, naming the defendants who were known to him, he was treated with a plea in abatement, which was a check-mate to his action. To meet this inconvenience, it became necessary to introduce into those bills a clause that the company should sue and be sued by their clerk or secretary. It was soon found that this provision did not set the matter right. The secretary, on behalf of the company, sued a man of opulence, and, if he succeeded, he recovered not only judgment, but payment of the demand. On the other hand, when the secretary was sued, the person suing found that, though he had gotten an individual with whom he could go into a court of law or equity in order to enforce a claim against him as defendant, yet, after he had gone thither, he frequently found that it would have been better for him not to have stirred; for though the secretary, when he was plaintiff, got the money for which he sued, he was often unable, when made defendant, to pay what the plaintiff recovered. That state of things suggested to a learned lord the necessity of making all the members liable, as well as the secretary, for a demand against the company. Thus there arose a third class of acts of Par-

In this country the first bank, called "The Bank of North America," was incorporated by an ordinance of the Continental Congress, passed Dec. 31, 1781; and the first Bank of the United States in February, 1791.¹

liament establishing companies; acts which made all the members, as well as the secretary, liable to answer demands recovered against the company. Still this was not enough. For as these acts did not provide the means of letting the world know who the members were, the consequence was that, though all the members were liable, nobody who had a claim against them could tell who the persons were that were thus liable. Another improvement was therefore made. A proviso was introduced requiring that before a company was formed, or within a given time afterward, there should be a register or enrolment of the individuals of whom the company was composed; and it was thought that thus at last the work had been done completely, and that all was safe. Unfortunately, however, it turned out, in consequence of sales and transfers of shares, that a person who was a member of the company to-day, was not a member of it to-morrow; the constituent members of the body were constantly changing; and a plaintiff did not know against whom to proceed, whether against the present or against former members. A further alteration was then made, the effect of which was that those who had been members should continue liable, although they had transferred their interest, and that those who became members should also be liable, an enrolment of the names both of the one and the other being required. This had a very considerable operation, and it was wonderful to observe how much, after it was adopted, the passion for becoming members of these companies diminished. One thing was still wanting.

If the members of these bodies happened to quarrel among themselves (which, though they came harmoniously together, was very likely to happen), how were they to sue one another? And it was not until the latest stage of improvement that that difficulty was provided for. I believe it was in the act regulating the new banking establishments in Ireland (5th Geo. 4, ch. 73) that provisions were for the first time made to meet all these difficulties; and similar provisions now form part of the regulations which are likely to take place in the banking establishments in England now in contemplation. There were some (and many, too) whose opinions were very well deserving of attention, who declared that if bodies were formed on such principles, they could not, in the courts of this country, and according to the laws of the country, effectually demand what they had a right to demand, or be effectually sued for that for which they were liable. The very circumstance of the existence of that inability or incapacity, and the inconvenience or impracticability of dealing with them in a court of justice; proved bodies of that kind to be illegal at common law. It was to make them legal that acts of Parliament were passed containing one or more of the series of provisions which I have mentioned.'

¹ New Am. Cycl., tit. *Bank*. A succinct account of the early history of the business of banking in the State of New York is given substantially as follows by COMSTOCK, J., in *Curtis v. Leavitt*, 15 N. Y. 9: "In the year 1791 an act was passed to incorporate the stockholders of the Bank of New York,

§ 12. **Object and use of corporations.**—The end sought to be attained by an act of incorporation is usually such as requires for its successful accomplishment the combined enterprise and pecuniary resources of a number of individuals

which became the model of some forty other institutions specially chartered prior to the year 1825. These banks were authorized to carry on the business of banking in general terms without specification of the power to issue bills or any other banking power. They were unrestricted in the exercise of any of their powers except that of contracting debt, which, over and above the specie in their vaults, was not to exceed three times the capital subscribed and actually paid in. The debt might be contracted in the issue of currency for circulation or otherwise, the amount only being limited. There was a prohibition also against trading in merchandise and stocks. . . . The solvency of banks was only guarded by these two provisions. . . . It was a most imperfect system, not for the particular reason that a bank might become insolvent in the exercise of the debt-creating power, whether by issues payable on demand or by time engagements, but because in the event of insolvency the currency circulating through the community would not be redeemed. . . . In the year 1825 two bank charters were granted, and no others until 1829. . . . Some new provisions were introduced, one of which required that fifty per cent. of the capital stock should be actually paid in. But the system remained unchanged. In the year 1827 a general act was passed, which took effect in January, 1828, and became incorporated in the revised statutes applicable only to existing banks. In this statute are some new regulations concerning the management of banking corporations directed to special abuses, but

no change in the system. The evils and abuses of such a system gave rise also to another code of regulations elaborately prepared, which took effect at the same time (1828), applicable to future charters and charters which should be renewed in future. This was the act to prevent the insolvency of moneyed corporations. This code, as well as the one applicable to existing banks, recognized in very unambiguous language a distinction between bills and notes for circulation payable on demand without interest and demands of a different character bearing interest. It omitted the provision limiting the amount of debt, but required the whole capital to be paid. Reports were required to be made to the controller, and a series of new and stringent regulations were laid down. The principles of bank legislation, however, remained unchanged. . . . The safety fund act of 1829 took a feeble step in the right direction by establishing a specific fund for the redemption of the circulating notes of insolvent institutions. . . . This act limited the issues for circulation to twice the amount of capital paid in, and, for the first time in the legislation of this State, it prohibited the issue of bills and notes unless payable on demand. The act was only applicable to future charters or previous ones to be renewed. . . . The legislature in 1837 reduced banking to a private business, except in the department of creating a circulating medium, and, as a private business, left it absolutely without restraint or control. Any person or association could deal in bullion, could habitually lend money, could receive

clothed with the powers and functions of an artificial being.¹ The purpose must relate to something deemed beneficial to the public; and this benefit constitutes the consideration and, in most cases, the sole consideration of the grant.² A duty is imposed on government to supply the public wants in this regard; and, as experience has shown that a State should not directly attempt to do this, it is necessary to confer on others the faculty of doing what the sovereign power is unable or unwilling to undertake.³ Accordingly corporations are created, which, although they may be directly and perhaps mainly promotive of private interests, yet will also secure the union and contribution of several persons in carrying out designs of general utility.⁴ Individuals who desire unitedly to employ their money permanently in some useful project, finding it impossible to do

deposits, discount notes and bills, and with these banking powers could run in debt, borrow money, and execute every species of obligation except circulating notes, just as a private person could do. But it remained for the legislature of 1838 to complete the work thus begun. . . . The cardinal point was to render the circulation absolutely secure. This was accomplished by providing for a deposit of mortgages and stocks, dollar for dollar, and by leaving the restraining laws in force as to all issues for currency not thus secured. Connected with this fundamental measure was the policy adopted by the legislature of 1837 as to other modes of banking, of permitting individuals and associations to issue their notes on giving the required security. This was also done. The next grand idea was to leave banking in all its other operations with the fewest possible restraints, and to permit it to be carried on like other branches of business. This, too, was accomplished.

These were the great features of the organic act of 1838."

¹ See remarks of Lord ELDON in *Van Sandam v. Moore*, 1 Russ. 441.

² "It may often be convenient for a set of associated individuals to have the privileges of a corporation bestowed upon them; but if their object is merely private or selfish,—if it is detrimental to or not promotive of the public good,—they have no claim upon the legislature for the privilege." ROANE, J., in *Currie v. Mu. Assoc. Soc.*, 4 Hen. & Munf. 315.

³ The *Binghamton Bridge*, 3 Wall. 51, per DAVIS, J.

⁴ Eminent political economists have objected to corporations created for the benefit of particular branches of trade and manufactures as against public policy on the following grounds: 1st, the obstruction of the free use and circulation of labor; 2d, the limitation of competition; 3d, the facility afforded to combinations among tradesmen for the purpose of defrauding the public. The subject is fully discussed in Dr. Adam Smith's *Wealth of Nations*.

this securely and certainly without an act of incorporation, apply to the legislature specifying their object and offering to advance the necessary funds to make it a success provided they are granted a charter. The proposition is considered and approved. The benefit to the public is regarded as an ample compensation for the powers conferred, and the corporation is created.¹ A mere association of individuals lacks coercive power to form and enforce its laws and rules of conduct; and when the members are dispersed by death, the privileges or immunities of the association cannot be transferred to others. So with reference to holding property. If land be granted to a number of persons not incorporated, there is no legal way of continuing the property to any other persons for the same purposes, except by endless conveyances.² But when they are consolidated and united into a corporation, they and their successors are considered as one person in law; and the privileges and immunities, estates and possessions of the corporation, when once vested in it, will be vested in succeeding members without any new conveyance. It is chiefly for the purpose of clothing bodies of men in succession with certain qualities and capacities that corporations were invented and are in use.

¹ Dartmouth College v. Woodward,
4 Wheat. 636, per MARSHALL, C. J.

² "There is certainly no metaphysical difficulty attending the transmission of landed property through a series of individuals in their collective capacity without the support of a positive institution. It has, however, been long an established maxim of the English law that land granted to a community or aggregate body of men not incorporated, cannot, by virtue of the original grant alone, be transmitted to their successors. It is difficult to account for the establishment of this rule. It can hardly be supposed to have been introduced on reasons of political expediency; for by renewed conveyances

the same property may be continued in succession to any community through an indefinite period. . . . The rule may perhaps have arisen from the law of joint tenancy and its incident of survivorship, by which, if land be purchased by several to them and their heirs, it does not go to the heirs of all, but to the heirs of the survivor. This, however, is not altogether a satisfactory derivation of the rule; for a purchase by a community would be in its collective capacity, with an intention to transmit the property, not to their heirs, but to their successors. Perhaps we must be satisfied with stating the rule as it is, without attempting to account for its origin." 1 Kyd on Corp. 6, 7.

By these means a perpetual succession of individuals is capable of acting for the promotion of the particular object like one immortal being. As one person, they have one will, which is collected from the sense of the majority of the corporators. This decision by a majority is a fundamental law of corporations. It is also a fundamental principle of these institutions that this majority may establish rules and regulations which are a sort of municipal law for the body corporate, subject only to the superior law prescribed by the legislature which grants the privilege.¹

§ 13. **Multiplication of corporate bodies.**—Corporations for a considerable period after their introduction were seldom created for any other than municipal purposes, and generally by royal charter. It is mainly due to very recent times that the law appertaining to the subject has been so modified, liberalized, and enlarged, as to constitute the present important and deeply interesting branch of jurisprudence.² The rapid growth of the United States in population and wealth, and the amazing progress made in useful inventions and in all the arts of civilized life, have occasioned a constantly increasing demand for corporations, not only in the business of commerce, manufactures, and the various details of internal improvement, but in the most diversified pursuits. It is, therefore, scarcely exaggeration to say that “these institutions have so multiplied and extended within a few years, that they are connected with, and in a great degree influence, all the business transactions of this country, and give tone and character to some extent to society itself.”³

¹ *Currie v. Mu. Assoc. Soc., supra.*

² See opinion of MILLER, J., in *Liv-*

erpool Ins. Co. v. Massachusetts, 10 Wall. 566.

³ CHURCH, J., in *Goodspeed v. East Haddam Bank*, 22 Conn. 530.

CHAPTER II.

KINDS OF CORPORATIONS.

- § 14. General classification.
- 15. How primarily divided.
- 16. Public corporations.
- 17. Private corporations.

- § 18. Ecclesiastical corporations.
- 19. Incorporated religious societies.
- 20. Eleemosynary corporations.
- 21. *Quasi* corporations.

§ 14. **General classification.**—Corporations, with reference to their objects, may be considered as belonging to one of three classes. The first are such as, although they involve to some extent private rights, yet are strictly public. The right of the legislature to establish, alter, or abolish public corporations is derived from their nature, for all municipal regulations must be subject to the absolute control of the government in furtherance of the public needs; and their existence is not based upon or the result of contract, the purposes of their creation and their duties being incompatible with everything of that kind.¹ The second class of corporations are such as have public obligations to discharge which are undertaken in consideration of certain benefits allowed and secured to the members. In cases of this kind there is something like a contract between the legislature and the corporation, though one of imperfect obligation

¹ See *Tinsman v. Belvidere R.R. Co.*, 2 Dutcher, N. J., 148; *Davidson v. New York*, 27 How. Pr. 342; *Barnes v. District of Columbia*, 91 U. S. 540; *Martin v. Dix*, 52 Miss. 53. A right to sell lottery tickets, conferred in the charter of a corporation, is not a contract within the meaning of the federal or of a State

constitution; but only a privilege, permit, or license, subject to withdrawal whenever the legislature, in the exercise of the police power of the State, may deem its continuance prejudicial to the public morals, or to the general welfare of society. *State v. Morris*, 77 N. C. 510.

with respect to the former, and subject to be dealt with by the legislature as the public good may require, a just compensation being required for any private property which may be taken for a public use. The third class of corporations are such as, though they are beneficial to the public, have no immediate concern with it, the sole object being the personal emolument of the members.¹

¹ McKim v. Odom, 3 Bland Ch. 407. In this case the chancellor gave substantially the classification adopted in the text, but not precisely in the same order, as follows: "The first kind of corporations is such as by assuming some of the duties of the State in a partial or detailed form, and having neither power nor property for the purposes of personal aggrandizement, can be considered in no other light than as auxiliaries of the government, and consequently as the secondary and deputy trustees and servants of the people. The right to establish, alter, or abolish such corporations seems to be a principle inherent in the nature of the institutions themselves; since all mere municipal regulations must, from the nature of things, be subject to the absolute control of the government. These institutions, being in their nature the auxiliaries of the government in the business of municipal rule, cannot have the least pretension to sustain their privileges, or their existence, upon anything like a contract between them and the government; because there can be no reciprocity of stipulation, and because their objects and duties are incompatible with everything of the nature of such a compact. . . . The second class of corporations are such as have no concern whatever with the duties of the republic, nor are in any manner bound to perform any acts for its benefit; but whose only object is the personal emolument of its members. The corporators in such institutions may

also in some sense be considered as trustees. But then even in that character they are the mere factors of individuals, and therefore their resignation or removal cannot divest or alter any of the rights of individuals they represented. . . . The third species of corporations partake in many respects of the nature of the first two classes, and are such as have a concern with some of the expensive duties of the State, the trouble and charge of which are undertaken and defrayed by them in consideration of certain emolument allowed and secured to their members. In cases of this kind there are certainly many of the material features of a contract between the government and the corporation; there is manifestly a *quid pro quo*. But this contract, if it be so, is, and of necessity must be, like all others to which a government or State is a party, one of imperfect obligation as regards the State, and as such to be dealt with by the government of the State as the public good may require, on making a just compensation for any private property which may be taken for a public use. No bodies politic of this description were ever created under the provincial government. But since our independence a great number of them have been called into existence—such as canal companies, bridge companies, turnpike road companies, etc."

Ayliffe (Civ. L. 196, 197), speaking of corporations under the civil law, says: "The first sort of corporations has re-

§ 15. **How primarily divided.**—Corporations are either aggregate or sole. The former consist of many persons united into one society, and kept up by a perpetual succession of members, as the mayor and commonalty of a city ; or such as are not municipal, and have a consolidated capital devoted to some enterprise for the promotion of private interests, as trading, insurance, manufacturing, turnpike, bridge, canal, railroad, banking, and literary, religious, and charitable associations. A corporation sole consists of one person only, and his successors in a particular station, in order to give him some legal capacities and advantages, particularly that of perpetuity. In this sense, in England, the reigning sovereign is a sole corporation, “to prevent, in general, the possibility of an *interregnum*, or vacancy, of the throne, and to preserve the possessions of the crown entire.”¹ So is a bishop, parson, vicar, and some deans and prebendaries ;² and the chancellor, regius professors of law and Hebrew, and reader of divinity in the University of Oxford, are respectively corporations sole.³

The governor of a State is a corporation sole, being so constituted by the organization of the State government, and not by any particular statute.⁴ When bonds are di-

spect unto such persons whose principal business regards religion—as chapters of cathedral or collegiate churches, monasteries, and the like ; and these are styled ecclesiastical corporations. The second class of communities extends itself to those persons who have to do with temporal affairs only—as the civil government of cities, towns, etc., which is styled the corporation of such a city, town, and the like ; and inferior unto these we may reckon the colleges and corporations of merchants, tradesmen, and artificers usually called companies. . . . The word *corpus* denotes any corporation or body politic whatsoever which is authorized by charter or prescription and governed by particular

laws given thereunto. But a community is a more general term.” In Texas private corporations are declared by statute to be of three kinds : 1st, religious ; 2d, for charity or benevolence ; 3d, for profit. In Michigan, superintendents of the poor are declared to be a corporation, and to possess the usual powers of a corporation for public purposes. Comp. Laws of Mich. 1871, p. 603.

¹ 1 Blk. Com. 470.

² Brice's *Ultra Vires*, by Green, 2d Am. Ed. 17.

³ *King v. Baylay*, 1 B. & Ad. 761, 770.

⁴ *Polk v. Plummer*, 2 Humph. 500. “The governor constitutes the execu-

rected to be made payable to him in his official capacity, they are payable to him as a corporation sole as to that particular transaction.¹ Where a minister of a parish is seized of lands in right of the town or parish, he is for this purpose a sole corporation, holding the lands to himself and his successors; and in case of a vacancy in the office, the parish is entitled to the custody of the same, and for that purpose may enter and take the profits until there be a successor.² In Massachusetts, by the provincial statute of 28

tive department of the State. It is one of his duties, among many others, to see that the laws of the State are executed and obeyed. This is a great and fundamental duty, without the observance of which society might and would necessarily be greatly distracted, and the proper security of life, liberty, and property be seriously endangered for the purpose of enforcing the execution of the laws, and the protection of the State from rebellion and invasion. He is the commander of the forces of the State. To hold that there can be an *interregnum* in this office would be to hold to temporary anarchy in the State, and, in order to hold that there is no such *interregnum*, we must hold that the governor, as such, never dies. To do this, he must be a corporation sole with succession in office." *Governor v. Allen*, 8 Id. 176, per TURLEY, J. "That a State is a corporation, cannot be doubted. It is a legal being, capable of transacting some kinds of business, like a natural person, and such a being is a corporation." BRONSON, J., in *State of Indiana v. Woram*, 6 Hill, 33, referring to *People v. Assessors of Watertown*, 1 Id. 620. In *North Hempstead v. Hempstead*, 2 Wend. 135, SAVAGE, C. J., said: "The State of New York owns a large quantity of land which belongs to the people of the State not in their individual, but in their political capacity. The

people, therefore, are not tenants in common in those lands, and an entry upon the lands without the license of the corporation (the State) would be a trespass."

¹ Ibid.

² *Weston v. Hunt*, 2 Mass. 501; *Brunswick v. Dunning*, 7 Id. 445; *Overseers v. Sears*, 22 Pick. 125. In England, "at the original endowment of parish churches, the freehold of the church, the church yard, the parsonage house, the glebe, and the tithes of the parish, were vested in the then parson, by the bounty of the donor, as a temporal recompense to him for his spiritual care of the inhabitants, and with intent that the same emoluments should ever after continue as a recompense for the same care. But how was this to be effected? The freehold was vested in the parson; and if we suppose it vested in his natural capacity, on his death it might descend to his heir, and would be liable to his debts and incumbrances; or, at best, the heir might be compellable, at some trouble and expense, to convey these rights to the succeeding incumbent. The law, therefore, has wisely ordained that the parson, *quatenus* parson, shall never die, any more than the king, by making him and his successors a corporation. By which means all the original rights of the parsonage are preserved entire to his successor." 1 Blk. Com. 470.

Geo. 2, ch. 9, the ministers of the several Protestant churches were made sole corporations capable of taking in succession any parsonage lands granted to the minister and his successors, or to the use of the ministry. And no alienation of any parsonage lands held by succession was valid any longer than he continued minister, unless, being minister of some particular town, district, or precinct, or being a minister of some Episcopal church, the alienation was made with the consent of the vestry.¹ It was said that there had been no instance of a sole corporation in Massachusetts, except that of a person seized of parsonage lands to hold to him and his successors in the same office in right of his parish; that there had been some instances in which certain public officers were empowered by statute to maintain actions as successors, such as judges of probate, and county and town treasurers; but that it was only where it had been expressly provided by law.² In the State of New York the supervisor of a town is a corporation sole, his power as such being derived by implication from the act creating the office, and prescribing its duties.³ Under the general banking law of New York of 1838, an individual banker was held not to be a corporation;⁴ but an officer or other person authorized to hold real and personal property to him and his successors, would be a sole corporation.⁵

An English writer divides sole corporations into two kinds: those where the person so denominated has a corporate capacity for his own benefit; and those where he acts only as a trustee for the benefit of others. Of the latter kind he instances the chamberlain of the city of London, "who may take a recognizance to himself and his successors

¹ *Weston v. Hunt, supra.*

² *Overseers v. Sears, supra.*

³ *Jackson v. Hartwell*, 8 Johns. 425;
Jansen v. Ostrander, 1 Cowen, 670;
North Hempstead v. Hempstead, 2

Wend. 109; *People v. Morris*, 13 Id. 355; *Thomas v. Dakin*, 22 Id. 102.

⁴ *Codd v. Rathbone*, 19 N. Y. 37;
Bank of Havana v. Magee, 20 Id. 355;
Hallett v. Harrower, 33 Barb. 537.

⁵ *Thomas v. Dakin*, 22 Wend. 102.

in his politic capacity in trust for the orphans.”¹ Among the political institutions of England there are many instances of the appropriation of particular revenues to the maintenance of a single person filling some particular station ; and as these revenues belong to the person not in his natural capacity, but in his public character, the right to them after his death vests of course not in his natural representative, but in the person who succeeds him in his office. Such persons, therefore, necessarily have in their political capacity perpetual succession resembling that of corporations ; and to give effect to this succession they must also necessarily have the capacity of suing and being sued in right of the office they hold distinct from their capacity of suing and being sued as private individuals. There are also instances of persons who hold particular offices, with power to act in their public character as trustees for others, which involves the necessity of their having perpetual succession, and the power of suing and being sued in their public character as far as their trust is concerned.² “A bishop or parson acting in a corporate capacity, and holding property to him and his successor in right of his office, has no need of a corporate name, he requires no peculiar seal, he performs all legal acts under his own seal, in his own name, and name of office ; his own will regulates his acts, and he has no occasion for a secretary, for he need not keep a record of his acts ; no need of a treasurer, for he has no personal property except the rents and proceeds of the corporate estate, and these he takes to his own use when received. By-laws are unnecessary, for he regulates his own action by his own will and judgment, like any other individual acting in his own right. Such a person holding an estate as a sole corporation dies or resigns his office ; the fee is in abeyance until a successor is appointed. The incumbent holds the property to his own use and benefit

¹ 1 Kyd on Corp. 20.

² Ibid.

whilst he retains the office, and afterward the estate and the enjoyment of it go together to his successor. The transmission of the estate is perpetual, but the beneficial enjoyment changes at each succession. On the other hand, a corporation aggregate has a perpetual existence without change, so that an estate once vested in it continues vested without interruption. From this flows one necessary but obvious legal consequence, which is, that a grant to an aggregate corporation carries a fee without the word successors; while a grant to a corporation sole without including successors carries a life estate only to the actual incumbent who is the first taker."¹

Another well-settled distinction is, that by the common law a sole corporation cannot take personal property in succession, and that its corporate capacity is confined to real estate. An aggregate corporation may take personal property for itself and its successors. Blackstone says that the reason why a sole corporation cannot do this, is that such movable property is liable to be lost or embezzled, and would raise a multitude of disputes between the successor and executor.² A corporation sole may by statute take per-

¹ Overseers v. Sears, 22 Pick. 125.

² According to Blackstone, if a sole corporation "be the representative of a number of persons, as the master of a hospital, who is a corporation for the poor brethren, an abbot or a prior by the old law before the Reformation, who represented the whole convent, or the dean of some ancient cathedral, who stands in the place of and represents in his corporate capacity the chapter, such sole corporations as these, have, in this respect, the same powers that corporations aggregate have to take personal property or chattels in succession. And, therefore, a bond to such a master, abbot, or dean, and his successors, is good in law; and the successor shall have the advantage of

it for the benefit of the aggregate society of which he is in law the representative. Whereas in the case of sole corporations which represent no others but themselves, as bishops, parsons, and the like, no chattel interest can regularly go in succession; and, therefore, if a lease for years be made to the bishop of Oxford and his successors, in such case his executors or administrators and not his successors shall have it. For the word successors when applied to a person in his political capacity, is equivalent to the word heirs in his natural. . . . This is not the case in corporations aggregate, where the right is never in suspense; nor in the other sole corporations before mentioned, who are rather to be considered as

sonal property by succession. Mr. Kent mentions the case of a treasurer or collector who is sometimes created a corporation sole for the purpose of taking bonds and other personal property to him in his official character, and of transmitting the same to his successor.¹

§ 16. **Public corporations.**—Corporations are public or private, according to the object of their creation, their character, and the nature and scope of their powers. Public corporations are such as are created wholly for public purposes.² They are invested with subordinate legislative powers, to be exercised for local purposes connected with the public good in the administration of civil government, subject to the control of the legislature, which may alter or repeal their charters at pleasure.³ Familiar examples of public corporations are counties, cities, towns, and villages. A corporation is public when it has for its object the government of a portion of the State. Although in such case it involves some private interests, yet, as it is endowed with

heads of an aggregate body than subsisting merely in their own right. The chattel interest in such a case is really and substantially vested in the hospital, convent, chapter, or other aggregate body, though the head is the visible person in whose name every act is carried on, and in whom every interest is therefore said in point of form to vest. But the general rule with regard to corporations merely sole is that no chattel can go to or be acquired by them in right of succession." 2 Blk. Com., 430, 431, 432. See *Terret v. Taylor*, 9 Cranch, 43.

¹ 2 Kent's Com., 9th ed., 319, *note*. When a person becomes sole owner of all the stock of a private corporation, he may relinquish his rights under the charter, and conduct the business as a private individual. *Swift v. Smith*, 65 Md. 428.

² *Dartmouth College v. Woodward*,

4 Wheat. 636. See *Tinsman v. Belvidere, etc.*, R.R. Co., 26 N. J. 148.

³ In England, according to Grant, such a body, if incorporated by public acts of Parliament, must be regarded as a public corporation. He defines public corporations as those that are established to serve great purposes of State, and which hold out advantages and benefits either to the public without restriction, or to every one who chooses to comply with their conditions. He instances the Bank of England, the East India Company, the railway, light, water, coke, and Hudson's Bay companies; the universities, free or public schools, and all ecclesiastical corporations, whether sole or aggregate. Grant on Corp. 9. As to what are deemed public corporations, see *Bennett's Appeal*, 65 Pa. St. 242; *Dean v. Davis*, 51 Cal. 406.

political power, the term *public* has been deemed appropriate.¹

Another class of public corporations are those which are formed for public, although not for political or municipal purposes, and the whole interest in which belongs to the Government. Thus, where a bank is created by the Government for its own uses, and the stock belongs exclusively to the Government, it is a public corporation.² And so is a hospital created and endowed by the Government for general purposes of charity.³ The president and trustees of the University of Alabama were held to constitute a public corporation.⁴ The United States having granted land to the State of Missouri for an institution of learning, the Legislature passed an act creating a corporation known

¹ Public corporations are but parts of the machinery employed in carrying on the affairs of the State, and they are subject to be changed, modified, or destroyed, as the exigencies of the public may demand. The State may exercise a general superintendence over them, their rights, and effects, provided their property is not diverted from the uses and objects for which it was given or purchased. Trustees, etc., v. Tatman, 13 Ill. 27. Trustees of schools are public corporations, subject to regulation and control by the legislature. Ibid.; and in Mississippi the trustees of the poor. Governor v. Gridley, Walker, Miss. 328.

² Miners' Bank v. United States, 1 Greene, Iowa, 553. In the State Bank of Illinois v. Brown, 1 Scam. 106, the court referred to some of its previous decisions, which held that the directors of the bank did not act for their own benefit, and that their omission or neglect did not work an injury to the State; that a release from all debts due to the State was a release of a debt secured to the bank by mortgage,

and that the State was not barred by the statute of limitations unless expressly named. It was also said that by the statute creating the State Bank, it was declared to belong to the State of Illinois; and that hence it followed that the people of Illinois were the real plaintiffs and alone entitled to the benefit of the recovery. A bank which issues bills for circulation as money is a public corporation; but a bank which, except a power to contract in its corporate name, has no powers beyond those which every other person possesses, is a private corporation. Atty. Genl. v. Simonton, 78 N. C. 57. In Virginia it was held that an action could not be maintained against the Northwestern Turnpike Company, which was composed exclusively of officers of the Government, who had no personal interest in it or in its concerns. Sayre v. Northwestern Turnpike Co., 10 Leigh, 454.

³ Regents of University of Md. v. Williams, 9 Gill & Johns. 365.

⁴ Trustees, etc., v. Winston, 5 Stew. & Port. 17.

as the University of the State of Missouri. The act committed the government of the institution to a board of curators to be elected by a joint vote of the Senate and House of Representatives and to be removable at the pleasure of the Legislature. It was held that the university was a public and not a private corporation.¹

In determining whether the powers exercised are public or private, regard should be had not so much to the nature and character of the rights conferred as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be deemed private.² To constitute a public corporation, it is not essential that it shall exercise all the functions of government within the prescribed region. School districts and road districts may be public corporations. Where an act provides that a district shall be organized under a particular name, with power to make contracts, incur debts, issue bonds, levy and collect assessments, and have perpetual succession, such district is made a public corporation.³

§ 17. **Private corporations.**—A corporation is private when the whole interest does not belong to the Government, or the corporation is not created for the administration of political or municipal power.⁴ A chartered religious society

¹ Head v. Curators, 47 Mo. 220; S. C. 19 Wall. 526.

² Bailey v. New York, 3 Hill, 531.

³ Dean v. Davis, 51 Cal. 406. See Soper v. Henry County, 26 Iowa, 264; Hamilton County v. Mighels, 7 Ohio St. 109; Commissioners v. Detroit, 28 Mich. 228; De Voser v. Richmond, 18 Gratt. 338.

⁴ Rundle v. Del. & Raritan Canal, 1

Wall. Jr. 275. An English writer gives the following definition of a private corporation: "A body of traders, or a scientific or other society, aiming only at objects of their own, and not contemplating the conferring any immediate benefit on the public, or taking upon themselves any public government, duty, or responsibility, incorporated by charter." Grant on Corp. 9.

is a private corporation.¹ A corporation may be private, and yet the charter contain provisions of a purely public character introduced solely for the public good, and as a general police regulation of the State: such as the statute of Henry 8th, ch. 5, creating the College of Physicians in London, and imposing a fine on persons practicing without a license from the college, which was held to be a private corporation; and the statute of the same reign founding the College of Barbers and Surgeons.² The fact that the public have an interest in the works or the property of a corporation, does not necessarily make it a public corporation, all corporations being, as we have seen, founded upon the principle that they will promote the interest or convenience of the public.³ Although a corporation has powers coextensive with a district, yet if its objects are for the promotion of the private interests of owners of real estate in the district, and others are not included in its provisions, it will be deemed a private corporation notwithstanding it may be a public benefit.⁴ In the cases of insurance, canal, bridge, and turnpike companies, the uses may in a certain sense be called public, but the corporations be private.⁵ A

In Vermont the term private corporation is defined to mean, "any corporation created for the purpose of making a turnpike road, railroad, or canal, for carrying on any branch of manufacture, for mining, for improving the navigation of a stream or other waters, for building wharves or storehouses, for building or using steamboats or other vessels, for the purposes of banking or insurance; and other corporations which from their object suppose a division of profits among the stockholders." Rev. Laws of Vt. 1880, p. 624, sec. 3251.

¹ Case of St. Mary's Church, 7 Serg. & Rawle, 517.

² Gilbert's Evidence, 13; Regents of

University of Md. v. Williams, 9 Gill & Johns. 365.

³ State v. Curran, 7 Eng. Ark. 321. A corporation may be private notwithstanding the State is a shareholder in it.

⁴ Directors v. Houston, 71 Ill. 318.

⁵ Ten Eyck v. Del. & Raritan Canal Co., 3 Harrison, N. J. 201; Tinsman v. Belvidere Del. R.R. Co., 2 Dutcher, N. J. 148; State v. New Orleans Gas Light & Banking Co., 2 Rob. La. 529. A road or canal is a public highway for the public benefit, if the public have a right of passage thereon by paying a reasonable stipulated uniform toll. If the public can pass and repass and enjoy its benefits by right, it matters not

railroad company is a private corporation, its outlays and emoluments being individual property, though it effects a public benefit.¹ The general management of such a company is left to individuals whose private interests prompt them to conduct it beneficially to the public. The public control continues as far as it is consistent with the interests granted, and in all cases as far as may be necessary to the public use. The Government may, upon sufficient cause, claim a forfeiture of the charter, or compel the construction or repair of the railroad by those undertaking it by any means applicable to other persons charged with like duties in respect to other highways. The difference is that the corporation has in lieu of the State the custody and property of the road, and the collection of the revenue, in return for the cost of construction, labor, and risk of capital. "As to the corporation it is a franchise like a ferry or any other. As to the public it is a highway, and in the strictest sense *publici juris*. The land needed for its construction is taken by the public for the public use, and not merely for the private advantage of individuals. It is only vested in the company for the purposes of the act, that is, to make the road."² A company incorporated to supply a community with water-power for manufacturing purposes, is not a mere private corporation controlling the power solely for

whether the toll is due to the public or to a private corporation. The true criterion is whether the objects, uses, and purposes of the incorporation are for public convenience or for private emolument, and whether the public can participate in them by right, or only by permission. *Bonaparte v. Camden & Amboy R.R. Co.*, 1 Baldwin C. C. 205.

¹ *Ala., etc., R.R. Co. v. Kidd*, 29 Ala. 221; *Sweatt v. Boston*, 3 Clifford, 339.

² *Raleigh & Gaston R.R. Co. v. Davis*, 2 Dev. & Batt. 451, per RUFFIN, C. J.

In an early case in New York it was suggested by the court that one of the strongest reasons why private corporations should be cautiously created arises "from the inviolability of the rights acquired under them; for notwithstanding a reserved power in the charter to modify or repeal, an interference seriously affecting this species of property is calculated to shake public confidence in the security of these corporations generally, and might and probably would be immediately disastrous to the property invested." NELSON, J., in *People v. Morris*, 13 Wend. 325.

its private interests; but of a *quasi* public character. It may not suffer its works to fall to decay and thus fail to furnish the power, nor contract so to alter the works as seriously to diminish or impair the value of the power.¹ But the fact that the State, upon the happening of a contingency, may have a reversionary interest in the corporate property, is not inconsistent with the idea that the company is a private corporation.² Nor does it make any difference that a portion of the funds have been contributed by the Government. Banks founded on private capital, hospitals founded on private benefactions, and colleges founded and endowed by private enterprise and liberality, although the funds may in part be derived from public bounty, are private corporations.³ The mayor and common council of the city of Louisville resolved to donate a designated square for the purpose of a college, and to erect buildings thereon, and provide a library and apparatus for the medical department. A deed was accordingly executed under their authority conveying the square to the Medical Institute of Louisville, to hold for the uses and purposes and upon the terms and conditions recited in the resolutions of the citizens, and of the mayor and common council. The city covenanted to erect on the square buildings for a medical college, at a cost not exceeding a specified sum; and the president and managers of the institute covenanted that in case a charter should be obtained, they would, on the request of the city or of the mayor and common council, convey to the trustees of the college the square, and all the improvements thereon, and the library, apparatus, etc., belonging at the time to the institute. In pursuance of the

¹ Society, etc., v. Butler, 1 Beasley (12 N. J. Eq.) 498.

² Moore v. Board of Trustees, 7 Ind. 462.

³ Although a bank the stock of which is owned by individuals, is a private

corporation, yet the legislature has a supervisory power over it to annul its charter when the franchises granted to it are misused or abused. *Miners' Bank v. United States*, 1 Greene, Iowa, 553.

covenant in this deed, and of the resolutions referred to, suitable buildings were erected on the square, and a library and apparatus provided by the city. The legislature thereupon passed an act authorizing, among other things, the medical institute to confer degrees in medicine, to establish professorships, and to hold the real estate, library, and apparatus, which it then possessed, under the terms and conditions on which it was donated, and such other estate, books, and apparatus as might be proper for such an institute. The right was reserved to repeal, alter, or amend the charter, but not to affect the right to the property. It was held that the corporation was private, because it was not the instrument or agent of the government created to exercise any of its powers, nor entrusted with its property or with the conduct of its affairs, and because it was endowed with the private property of Louisville and others; and eleemosynary, because it was created and endowed for the promotion of education, and because its endowment reduced the cost of instruction to the students generally, and enabled the institution to educate a certain number gratuitously; and that so much of an amended charter of the city of Louisville as purported to vest in a new corporation or in new trustees the property and privileges of the original corporation was unconstitutional and void.¹ An incorporated academy founded on private funds, is, like a

¹ *City of Louisville v. University of Louisville*, 15 B. Mon. 642. "The government' may as well bestow its bounty upon a private corporation for charity, as upon a public corporation; and its funds once bestowed upon the former become irrevocable, precisely in the same manner and to the same extent as if they had been bestowed upon an individual. The government cannot resume a gift once absolutely made to a private person; neither can it resume a like gift to a private corporation. It is true that the government

may reserve such a power in granting a charter if it chooses so to do; but then the power arises from the very terms of the grant, and not from any implied authority derived from the bounty being for general charity, any more than it would from its being for private charity. The government may reserve a right to revoke at pleasure even its private gifts; but certainly the law will not imply such right without some positive expression of such an intention." *STORY, J.*, in *Allen v. McKean*, 1 Sumner, 276.

college, a private corporation, notwithstanding it is also a beneficiary of the State.¹

§ 18. **Ecclesiastical corporations.**—Corporations may be either ecclesiastical (commonly termed in this country, religious) or lay. In England, previous to the Reformation, ecclesiastical corporations were subdivided into regular and secular. Regular corporations were composed of ecclesiastical persons who lived under some rule, had a common dormitory and refectory, and were obliged to observe the statutes of their order. Secular corporations were so called because they performed spiritual offices to the laity, and took upon themselves the cure of souls.² Anciently, abbots and prelates were supposed to be married to the church, inasmuch as the right of property was vested in the church, and the bishop and abbot, as representatives of the church, had the right of possession; might maintain actions; and might hold courts within their manors and precincts as the entire owners.³ At common law, the Church of England is not a corporation, but the religious establishment of the realm. In the latter sense, it is said to have peculiar rights and privileges, not as a corporation, but as an ecclesiastical institution under the patronage of the Government. In this sense it is used in *Magna Charta*.⁴

By the common law in force at the emigration of our

¹ Cleaveland v. Stewart, 3 Kelly, Ga. 283. See Turnpike Co. v. Wallace, 8 Watts, 316; Seymour v. Milford, etc., Turnpike Co., 10 Ohio, 476.

² 1 Kyd on Corp. 22, 23; Bac. Abr. tit. Corp. "Among such colleges or corporations as are approved by the civil law, we may first include colleges erected on a religious account, as monasteries and the like; secondly, such as are founded on the score of learning; and thirdly, such as are established for the sake of public charity, which we in other terms call hospitals. Such as are erected on the score of learning and

public charity, are deemed secular corporations; but such as are founded on the account of religion, and reputed in law to be ecclesiastical, and, according to the canon law, such cannot be formed without the Pope's authority. There are, also, some other colleges or corporations of tradesmen, which the civil law permits in some cities, or places of traffic, and these we call companies." Ayliffe, Civ. L. 203.

³ Gilbert on Tenures, 110.

⁴ 2 Inst. 2, 3; Town of Pawlet v. Clark, 9 Cranch, 292.

ancestors to this country, the right to present or collate to churches of the Episcopal persuasion, and the corporate capacity of the parsons to take in succession, was recognized and avowed in the royal grants and commissions. It was the exclusive privilege of the crown to erect the church in each town that should be entitled to the glebe, and upon such erection, to collate, through the governor, a parson to the benefice. The towns, in their corporate capacity, had no control over the glebe. As, however, they were required by the provincial statute to maintain public worship, the glebe could not, before the erection of a church, be aliened by the crown without their consent. Nor after the erection of the church, and induction of a parson, could the glebe be aliened without the consent of the crown, the parson, and the parishioners.¹ Where no church was erected, the glebe remained as an *hereditas jacens*; "and the State, which succeeded to the rights of the crown, might, with the assent of the town, alien or incumber it, or might erect an Episcopal church therein, and collate, either directly, or through the vote of the town indirectly, its parson, who would thereby become seized of the glebe *jure ecclesiæ*, and be a corporation capable of transmitting the inheritance." Such were the rights and privileges appertaining to the Episcopal churches of New Hampshire before the Revolution.²

¹ Town of Pawlet v. Clark, *supra*, per STORY, J.

² Ibid. In the thirty-first year of Charles 2d, the crown, by royal commission, granted to the subjects of the province that "liberty of conscience shall be allowed to all Protestants, and that such especially as shall be conformable to the rites of the Church of England shall be particularly countenanced and encouraged." By a commission of 15 Geo. 2d, the governor of the province, among other things, was authorized "to collate any person or

persons to any churches, chapels, or ecclesiastical benefices, within our said province, as often as any shall be void"; and this authority was continued and confirmed in the subsequent reign. By the statute of 13 Anne, ch. 43, the respective towns in the province were authorized to choose, settle, and maintain their ministers, and to levy taxes for this purpose, so always that no person who constantly and conscientiously attended public worship according to another persuasion, should be excused from taxes. And the respect-

The religious establishment of England was adopted in the colony of Virginia at an early period, with the general rights and authority of the Episcopal Church at common law. The church could receive endowments of land, and the minister of the parish was seized of the freehold of its inheritable property, and might, as a sole corporation, transmit the inheritance to his successors. The church-wardens were a corporate body, clothed with authority and care over church repairs, and its temporal property. Various statutes in relation thereto were from time to time passed. By that of 1784, ch. 88, the minister and vestry, and, in case of a vacancy, the vestry of each parish respectively, and their successors, were constituted "a corporation by the name of the Protestant Episcopal church in the parish where they respectively resided, to have, hold, use, and enjoy all the glebes, churches, and chapels, burying-grounds, books, plate, and ornaments, appropriated to the use of it; and every other thing the property of the late Episcopal church, to the sole use and benefit of the corporation." The same statute also provided for the choice of new vestries, and repealed all former laws relating to vestries and church-wardens, and to the support of the clergy, etc., and dissolved all former vestries; and gave the corporation extensive powers in relation to purchasing, holding, aliening, repairing, and regulating the church property. This statute was repealed by the statute of 1786, ch. 12, with a proviso saving to all religious societies the property to them respectively belonging, and authorizing them to

ive towns were further authorized to build and repair meeting-houses, ministers' houses, and school-houses, and to provide and pay schoolmasters. Whenever within the province, before the Revolution, an Episcopal church was erected by the crown in any town, the parsons of it, regularly inducted, had a right to the glebe in perpetual

succession. When no such church was erected by the crown, the State, which succeeded to the rights of the crown, might, with the assent of the town, alien or incumber the glebe, or erect an Episcopal church, and collate its parson, who would thereby become seized of the glebe, and be a corporation capable of transmitting the inheritance.

appoint, from time to time, according to the rules of their sect, trustees who should be capable of managing and applying such property to the religious use of such societies; and the statute of 1788, ch. 47, declared that the trustees, appointed in the several parishes to take care of and manage the property of the Protestant Episcopal church, and their successors, should, to all intents and purposes, be considered as the successors to their former vestries, with the same powers of holding and managing all the property formerly vested in them. These statutes, and several others, were repealed by the statute of 1798, ch. 9, as inconsistent with the constitution and religious freedom.¹ In *Turpin v. Locket*,² the decision of Chancellor WYTHE, sustaining the validity of the statute of 1801, ch. 5 (which was passed after the District of Columbia was separated from the States of Maryland and Virginia), asserting the right of the legislature to all the property of the Episcopal churches in the respective parishes of the State, and, among other things, directing and authorizing the overseers of the poor, and their successors in each parish wherein any glebe land was vacant, or should become so, to sell the same, and appropriate the proceeds to the use of the poor of the parish, was affirmed by an equal division of the Court of Appeals.

§ 19. **Incorporated religious societies.**—Religious societies existing by statute in the several States of the Union, when incorporated, are civil corporations governed by the ordinary rules of the common law, and not ecclesiastical corporations in the sense of the English law.³ Story,⁴ in speaking of article one of the amendments of the Constitution of the United States, which provides that Congress shall make no

¹ *Terrett v. Taylor*, 9 Cranch, 43, per STORY, J.

² 6 Call, 113, followed and approved in *Selden v. Overseers of the Poor*, 11 Leigh, 127.

³ *Robertson v. Bullions*, 1 Kernan, (11 N.Y.) 243; *People v. Rector, etc.*, of the Church of the Atonement, 48 Barb. 603; *Watkins v. Wilcox*, 4 Hun, 220.

⁴ Const., sec. 1879.

law respecting an establishment of religion, or prohibiting its free exercise, says : " It was under a solemn consciousness of the dangers from ecclesiastical ambition, the bigotry of spiritual pride, and the intolerance of sects, exemplified in our domestic as well as foreign annals, that it was deemed advisable to exclude from the National Government all power to act upon the subject. The situation too of the different States equally proclaimed the policy as well as the necessity of such an exclusion. In some of the States Episcopalians constituted the predominant sect ; in others, Presbyterians ; in others, Congregationalists ; in others, Quakers ; and in others again was a close numerical rivalry among contending sects. It was impossible that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendancy, if the National Government were left to create a religious establishment. The only security was to extirpate the power. But this alone would have been an imperfect security if it had not been followed up by a declaration of the right of the free exercise of religion—a prohibition (as we have seen) of all religious tests. Thus the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions ; and the Catholic and the Protestant, the Calvinist and the Armenian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith or mode of worship." " The law does not attempt to enforce the precepts of Christianity on the ground of their sacred character or divine origin. Some of these precepts are universally recognized as being incapable of enforcement by human laws, notwithstanding they are of continued and are of universal obligation. Christianity, therefore, is not a part of the law of the land in the sense that would entitle the courts to take notice of, and base their judgments upon it ;

except so far as they should find that its precepts had been incorporated in, and thus become a component part of, the law."¹

The importance given to church membership by some of the colonial and provincial laws, by making it a necessary legal qualification for civil and political office, conferred no power on the church to be exercised in its aggregate capacity.² The only circumstance which gives a church any legal character, is its connection with some regularly constituted society.³ Primarily, it "is nothing but a voluntary association of persons for religious worship, and for its main and distinctive purpose corporate powers are not important. Indeed, the church as such is not usually incorporated, but the corporation is an associate body composed of the congregation, who may or may not be religious persons, and who take on corporate powers for convenience in holding and transferring property, entering into contracts, etc. Where there is no incorporation, those who deal with the church must trust for the performance of civil obligations to the honor and good faith of the members; whereas in case of incorporation, they would deal with a legal body, capable of binding itself."⁴

¹ Cooley's Const. Lim. 472.

² Stebbins v. Jennings, 10 Pick. 172; Weld v. May, 9 Cush. 181.

³ Parker v. Fales, 16 Mass. 488.

⁴ Church of Newark v. Clark, 41 Mich. 730, per COOLEY, J. The word "church" may have three meanings: 1st. The edifice; 2d. The society organized under the statute; 3d. The body of church members or communicants. LARNED, P. J. Sheldon v. Vail, 28 Hun, 354. "A church is understood among those whose polity is congregational or independent, to be a body of persons associated together for the purpose of maintaining Christian worship and ordinances. A religious society is a body

of persons associated together for the purpose of maintaining religious worship only, omitting the sacraments. A church and society are often united in maintaining worship; and in such cases the society commonly owns the property, and makes the pecuniary contract with the minister. But in many instances societies exist without a church, and churches without a society. Churches are not corporate bodies, and commonly have no occasion for the exercise of corporate powers." CHAPMAN, J. Silsby v. Barlow, 16 Gray, 329. A missionary society is a religious society. Stephenson v. Hart, 92 N. Y. 433.

In Massachusetts, all religious societies were originally corporate bodies. The towns at first exercised parochial powers, most of the people of the State being of one denomination. But as differences of opinion sprang up, it became necessary to separate the parochial from the municipal business, and the parishes formed separate organizations. Other religious societies were incorporated by special acts, but many congregations remained unincorporated. The statute of 1811¹ enabled unincorporated religious societies to take, hold, manage, use, and enjoy property, and to choose trustees, agents, and officers. This provision was re-enacted in 1834, and afterward in the revised statutes.² By statute C,³ "the deacons, church-wardens, or other similar officers of all churches or religious societies, if citizens of the United States, shall be deemed bodies corporate for the purpose of taking and holding in succession all grants and donations, whether of real or personal estate, made either to them and their successors or to their respective churches, or to the poor of their churches."⁴ As such corporations, they have distinct powers and functions, and constitute an entirely distinct body from the church.⁵ When there is a change of deacons by death, removal, or otherwise, those who go out cease to hold the church property, and those who come in are forthwith invested with the right of property, and, *prima facie*, with the right of possession.⁶

In New York the statute of 1784 recognized three distinct classes or bodies as existing in a religious corporation, and defined their relative powers and duties: the church or

¹ Ch. 6, sec. 3.

² St. of 1834, ch. 183, sec. 5; Rev. Sts., ch. 20, sec. 25; *Silbly v. Barlow*, 16 Gray, 329.

³ Rev. Sts. of Mass., ch. 20, sec. 39.

⁴ See *Sawyer v. Baldwin*, 11 Pick. 492.

⁵ *Page v. Crossly*, 24 Pick. 211.

⁶ *Jefts v. York*, 10 Cush. 392. But

although they are endowed by statute with limited corporate powers to take gifts and donations, and hold property in succession for the benefit of the church, they have no authority to issue promissory notes to bind their successors, or to enter into executory contracts. *Ib.*

spiritual body, consisting of the office-bearers and communicants; the congregation or electors, embracing all the stated hearers or attendants on divine worship who were competent to vote for trustees; and the trustees of the corporation who had control of all of its temporalities, to be improved, used, and managed by them for the benefit of all the stated hearers and of the communicants as far as was practicable.¹ Under the act of 1813 for the incorporation of religious societies,² the members, whether communicants or not, were the corporators, and the trustees the managing officers of the corporation.³ The existence of the church proper as an organized body was not recognized; nor did its existence or non-existence, or its denominational character or connections, in any manner affect the legal nature of the corporation. Each as a body was independent and free from any direct control or interference of the other, although the majority of the corporators, if so disposed, might, through their control over the property and revenues of the society, exercise an important incidental influence upon the character and destinies of the church. This might in some instances operate with severity and injustice, by enabling those who had recently become members of the society, if in a majority and so disposed, to change its religious character and modes of worship against the will of its original founders and chief contributors.⁴ In 1875 and 1876 acts were passed

¹ *Lawyer v. Cipperly*, 7 Paige Ch. 281.

² Laws of N.Y. of 1813, ch. 60, sec. 16.

³ *Robertson v. Bullions*, 11 N. Y. 243; *People v. Fulton*, *Ibid.* 94; *Gram v. Prussia, etc., Soc.*, 36 *Id.* 161.

⁴ *Parish of Bellport & Petty v. Tooker*, 21 N. Y. 267, *aff'g* s. c. 21 Barb. 256; *Matter of Ref. Dutch Ch.*, 16 *Id.* 241; *Burrel v. Assoc. Ref. Ch.*, 44 *Id.* 282; *Bowen v. Irish Presbyterian Cong.*,

6 Bosw. 245. Public worship was no less the public worship of the society, although it might proclaim different doctrines or follow a different mode of worship from that of the founders of the church, provided it was statedly and regularly conducted according to the will of the society, which meant the will of the members regularly and duly ascertained and expressed. *Robertson v. Bullions*, *supra*. In *Parish of Bellport & Petty v. Tooker*, *supra*,

by the Legislature of New York, depriving the congregation as well as trustees of religious societies of the power to divert the church property from the propagation and dissemination of the religious views of the persons acquiring it to the promulgation and maintenance of any different system of religious belief. Instead of simply holding the property subject to the disposition of the voting majority of the congregation, the trustees were henceforward required to hold and devote it to the uses and purposes of the

the question was whether the trustees and a majority of the society could change from Congregationalists to Presbyterians, and keep possession of the property against those who adhered to the faith of the founders of the church and society; and it was held that they could, and that a portion of the members, organized into a separate body called the church, had no power to impress its distinctive character upon the corporation so as to render it inefaceable by the voice of the majority of the corporators. SELDEN, J., who delivered the opinion, suggested two modes by which this might be done: "One is by causing the property to be conveyed to the society upon the express condition that it shall be forever thereafter devoted to the purposes of religious worship by a congregation maintaining a certain faith, and observing certain prescribed ordinances and forms. The other mode is suggested in the act which provides that no person shall become a member of such society after its incorporation, and entitled to vote at an election, unless he has been a stated attendant on the worship of the society for at least one year before such election. The society, through its trustees, may determine what persons it will thus admit to membership, and in this way exclude obnoxious persons who would be likely to create division." Property

may be dedicated by way of trust to the purpose of sustaining, supporting, and propagating definite religious doctrines or principles, and it is the duty of the court, in a case properly made, to see that the property so dedicated is not diverted from the trust which is thus attached to its use. *Watson v. Jones*, 13 Wall. 679; *Hale v. Everett*, 53 N. H. 9. See *Field v. Field*, 9 Wend. 395; *Lawyer v. Cipperly*, 7 Paige Ch. 281; *Gable v. Miller*, 10 Id. 627; *People v. Steele*, 2 Barb. 397; 2 Denio, 492. Lord ELDON, in administering the equity of the statute 43 Eliz., ch. 4, relative to charitable uses, interfered to prevent the trustees of a church, erected for Trinitarian Protestant dissenters, from being converted into an Unitarian chapel, although a large portion of the members of the congregation were said to have embraced the new doctrine. The decision was put upon the ground that the court was bound to see the trust executed according to the intention of the original founders of the charity. *Attorney-General v. Pearson*, 3 Meriv. 264. See *Smith v. Nelson*, 18 Vt. 511. But in New York it was held that a court of equity would not interfere to prevent the majority of the corporation in a religious society from introducing such changes in the doctrines or modes of worship as they might deem expedient, and which they could introduce through

denomination of Christians in which the society obtaining it was included.¹

An amendment of a charter of a religious corporation, involving a change in matters of faith and religious doctrine, will not be made at the instance of the majority of the corporation against the objection of the minority.² The title to the church property of a divided congregation is in that part of it which is acting in harmony with its own law; and the ecclesiastical laws, usages, customs, and principles which were accepted among them before the dispute began, are the standards in determining which party is right.³ In Ohio it was decided, in an early case, that the property of a religious society was held at the will of the majority, notwithstanding the majority had defeated the principles under which the association was organized.⁴

In New York, the legal title to the property of a religious society of Shakers was originally vested in and held by trustees appointed from its members, in trust for the uses and purposes expressed in the covenant, and subject to the rules, conditions, and regulations therein prescribed. Each trustee executed upon his appointment a written declaration of the trust, and their authority and powers were defined in the covenant. Subsequently, an act of the legislature provided that all deeds of trust of real or personal estate executed and delivered prior to a specified date, to any persons

their trustees elected in the manner prescribed by law. Baptist Church in *Hartford v. Witherell*, 3 Paige Ch. 296.

¹ Laws of N. Y. of 1875, p. 79, sec. 4, ch. 79; of 1876, ch. 176; *Isham v. Trustees of First Presbyterian Church*, 63 How. Pr. 465.

² *Matter of Hebron, etc., Church*, 9 Phila. 609.

³ *McGinnis v. Watson*, 41 Pa. St. (5 Wright) 9.

⁴ *Keyser v. Stansifer*, 6 Ohio, 363. In this case, the court gave emphasis to its views by indulging in the following

metaphor: "The opinions of such a body cannot but change. To fix their fleeting wheries; to anchor them immovably in the stream of time, is beyond human power; for the mind at least is free, ranging by its inherent strength through the boundless field of knowledge, moulding its belief according to its apprehension of the truth, and incapable of fixedness until the day when all truth shall be made known. And if it were possible, it were wrong. To limit activity of mind, is to set boundaries to human knowledge."

in trust for any "united society of people called Shakers," should be valid and effectual to vest in the trustees the legal estates and interests conveyed for the uses declared in such deeds, or declared in any declaration of trust executed by the trustees, in the same manner and to the same effect as before, and that such legal estate and trusts, and all the legal authority with which the original trustees were vested by virtue of their appointment and conferred powers, should forever descend in regular succession to their successors in office and trust, who, in conformity to the constitution of the society, had been duly chosen and appointed. It was held that the trustees of the society were to be deemed a corporate body, and the property held by them as corporate property, for the purposes of a suit to enforce a contract made by them in behalf of the society.¹

In New Jersey, under the statute incorporating religious societies, the civil office of trustee is created by the ecclesiastical office of minister, elder, or deacon, who remains such as long as the ecclesiastical office continues.²

In Presbyterian societies the authority of the congregation is recognized in their book of government, and exemplified in practice. The congregation directs the trustees; the former acting as the substantial beneficial owners; the latter, as the legal instruments to execute their will.³ In Illinois, under the act of 1845, the trustees of a religious society are the corporate body.⁴

In order to give an organization for public worship legal rights, and to impose upon it legal obligations as a corporate body, there must be a special law declaring its existence, or an incorporation under the provisions of the general law relating to religious societies.⁵ A statute authorizing the

¹ *White v. Miller*, 71 N. Y. 118.

² *Doremus v. Dutch Ref. Church*, 3 N. J. Eq. (2 H. W. Green) 332.

³ *Rose v. Morgan*, 22 N. J. Eq. 583;

Worrell v. First Presbyterian Church, 23 Id. 96.

⁴ *Ada Street M. E. Church v. Garnsey*, 66 Ill. 132; *Little v. Bailey*, 87 Id. 239.

⁵ *Petty v. Tooker*, 21 N. Y. 267.

formation of a religious corporation, must be at least substantially complied with, and all its express requirements be observed.¹ To prove the incorporation, the original certificate should be produced or accounted for; the record of the certificate not being primary evidence.² The fact that the certificate, under the act of New York of 1813, ch. 60, as recorded, did not appear to have had seals, was held not necessarily fatal to its validity: the holding of a meeting, the election of trustees, and the execution of the certificate in accordance with the statute, constituting the substantial requirements to create a corporation.³ Proof that certain persons, under the name of "The Reformed Church," etc., had maintained regular religious observances and church service for a period of twenty years, or more, without evidence of any charter or written declaration of rights or powers, is not sufficient to establish the existence of a corporation *de facto*; mere user, or the assumption of corporate capacity, not being enough.⁴ In Michigan, however, it is provided by statute that whenever any religious society or corporation shall have exercised the franchises and privileges of a corporation for the term of ten successive years, the same shall be presumed to have been legally organized in pursuance of the laws of the State.⁵ Where

¹ *Ferraria v. Vasconcelles*, 23 Ill. 456.

² *Paddock v. Brown*, 6 Hill, 530.

³ *Trustees v. Bly*, 73 N. Y. 323.

⁴ *Van Buren v. Reformed Church*, 62 Barb. 495; *U. S. Bank v. Stearns*, 15 Wend. 314; *Meth. E. Union Church v. Pickett*, 19 N. Y. 482.

⁵ *Comp. L. of Mich.*, sec. 3089; *Trustees v. Rechlin*, 49 Mich. 515. "Before an act can be accepted and treated as the exercise of a corporate franchise or privilege, it must be made to appear that it is something which distinctly pertains to corporate powers. It must not be an act ambiguous in itself, and which as properly belongs to a

partnership, or to an unincorporated association of persons. It must be something which in itself implies an assertion of corporate existence; that shall inform those who know of it that corporate powers are claimed, so that the public authorities, if they dispute the fact, may take proceedings to have it tried; otherwise, a corporation which must owe its franchises to the grant of the State, might come into existence by mere lapse of time without a grant, and without the previous knowledge of the public or of the authorities, that anything was being done or asserted that implied a claim of such franchises."

a religious corporation has been dissolved by non-user or neglect to exercise the powers necessary for its preservation, the question, upon re-incorporation, of identity, is one of intention, that is, whether the new act creates a new body politic or corporate, or merely revives the old one.¹

The civil courts will not review the decision of a church tribunal on a question of discipline or church law;² nor a mandamus lie to compel a religious society to restore to membership a person who has been expelled by a church court.³ Where a person was expelled from a religious society of Shakers for refusing to conform and subject herself to the counsels and directions of the elders and adhering to objectionable opinions and doctrines, it was held that a civil court could not try the question whether such opinions and doctrines were in reality inconsistent with the established belief of the society.⁴ In this country no eccle-

COOLEY, J., in *Meth. Church of New-ark v. Clark*, 41 Mich. 730. See *Willard v. Trustees of Meth. E. Church*, 66 Ill. 55. As to mortgage of real estate by a religious society, see *Scott v. First Meth. Church of Jackson*, 50 Mich. 528.

¹ *First Soc. of M. E. Church v. Brownell*, 5 Hun, 464.

² *Gaff v. Greer*, 88 Ind. 122; *Tigard v. Moffit*, 13 Nebraska, 565.

³ *State v. Hebrew Cong.*, 31 La. Ann. 205. By the English common law an excommunicated person was disabled from doing any act that was required to be done by one who was *probus et legalis homo*. He could not serve on juries, be a witness in any court, or maintain an action to recover land or money. If within forty days after the sentence was published in the church the offender did not submit and abide by the sentence of the spiritual court, the bishop might certify such contempt to the king in chancery. Upon which there issued a writ to the sheriff of the county directing him to

take the offender and imprison him in the county jail until he was reconciled to the church and such reconciliation certified by the bishop. 3 Blk. Com. 102. The reasonableness or propriety of a sentence of excommunication depriving a party of all his rights and privileges as a member of a church cannot be inquired into by a civil court. *Fitzgerald v. Robinson*, 112 Mass. 371. But although a civil court cannot determine who ought to be members of a religious society, nor whether persons excommunicated have been regularly or irregularly cut off, but must accept the fact of excommunication as conclusive proof that the persons excised are not members, yet it may inquire whether the resolution of expulsion was the act of the church or of persons who did not constitute it and who consequently had no right to excommunicate. *Bouldin v. Alexander*, 15 Wall. 131.

⁴ *Grosvenor v. United Soc. of Believers*, 118 Mass. 78.

siastical body has power to enforce its decrees by temporal sanctions. Its decisions are advisory and addressed to the conscience, and, except where civil rights are dependent upon them, have no effect beyond the tribunal which pronounces them. Where, however, a civil right depends upon an ecclesiastical matter, it is of course determined by a civil court which tries the civil right.¹ When rights of property or civil rights as contradistinguished from ecclesiastical rights are involved, and such rights depend upon the religious faith or orthodoxy of citizens, or upon the rules, discipline, and practice of churches or religious denominations, the courts of the State may hear evidence and determine judicially all such questions so far as they affect the rights of persons or of religious denominations to property or civil rights.² So, when rights of property which are secured to congregations and individuals by the organic law of the church are violated by unconstitutional acts of the

¹ *Harmon v. Dreher*, 1 Speer's Eq. 87; *German Ref. Ch. v. Sibert*, 3 Pa. St. 282. At a general meeting of the members of a religious society the plaintiff was elected sexton for a year at a fixed annual salary and entered into a contract with the trustees by which he became bound for the faithful performance of his duties and to obey the orders of the president. Afterward, at a meeting of the board of trustees, it was resolved to discharge the plaintiff from his employment for alleged cause, and he was accordingly discharged before the end of the year. It was held no answer to an action for the non-fulfilment of the contract that the board of trustees discharged him; that the cause of the discharge must be shown and be such as the law would deem a sufficient one for dismissing him; and that it did not help the case that he was expelled from membership in the society upon the charges which caused his discharge as

sexton. *Stern v. Congregation, etc.*, 2 Daly, 415. "A sexton has been defined to be the keeper of the holy things belonging to the divine worship. 3 Burns' Eccl. L. 342, 6 Lond. Ed. Where, as in England, the position may be for life, it is deemed an office in which the incumbent has a freehold of which he cannot be deprived by ecclesiastical censures, though punishable thereby. 1 Blk. Com. 395; 2 Rolles Abr. 234; 3 Burns' Eccl. L., tit. *Sexton*. But it is otherwise where, by the usage, he holds at the pleasure of those who elect or appoint him, for in that case, those who appoint have also the power to remove him at pleasure. *Rex v. Guardians, etc.*, 1 Stange, 115." DALY, F. J., in *Stern v. Congregation, etc.*, *supra*.

² *Ferraria v. Vasconcelles*, 23 Ill. 456; *Grimes v. Harmon*, 35 Ind. 198; *Feizel v. Trustees of German M. E. Soc.*, 9 Kansas, 592.

higher ecclesiastical courts, the parties thus aggrieved are entitled to relief in the civil courts, as in the ordinary cases of injury resulting from the violation of a contract or of the fundamental law of a voluntary association.¹ But, in deference to the rights of church tribunals, a civil judge should "lend a reluctant ear to a claim founded on the alleged invalidity in view of the law of the church of an act done in the accustomed manner by the accustomed organ of authority."²

§ 20. **Eleemosynary corporations.**—Lay corporations are of two classes—eleemosynary and civil. The former are such as are constituted for the perpetual distribution of the free alms or bounty of the founder of them to such persons as he has directed.³ Of this description are hospitals for the maintenance and relief of the poor, sick, or impotent; and colleges and schools for the promotion of learning by imparting assistance to the members of those bodies in order to enable them to prosecute their studies. In this country, Dartmouth College, which was founded by private benefactions, is an eleemosynary corporation.⁴ Where an act of Congress reserved certain townships for the use of a seminary of learning, and subsequent acts incorporated the Vincennes University, and provided that the trustees in their corporate capacity, or a majority of them, might sell and convey any portion of the land, not exceeding four thousand acres, for the use of the university, and rent the remainder for the same use, it was held that the university was not a public corporation, but a private eleemosynary

¹ *Watson v. Avery*, 2 Bush. Ky. 332.

² *Gibson v. Armstrong*, 7 B. Mon. 481. See *Lucas v. Case*, 9 Bush. 297. The trustees of a free church are entitled to control the places where persons shall sit in the absence of proof that by usage or otherwise rights have been acquired to special seats. *Sheldon v. Vail*, 28 Hun, 354. A pur-

chaser of a lot in a cemetery may restrain by injunction a violation of his right to the use of it. *Burke v. Wall*, 29 La. Ann. 38.

³ 1 Blk. Com. 471; 1 Kyd on Corp. 25; *Trustees of Phillips Academy v. King*, 12 Mass. 546.

⁴ *Dartmouth College v. Woodward*, 4 Wheat. 681.

corporation in which the State had no property, and could exercise no power to defeat the trust.¹ The charter of a college recited that the institution was founded and had been supported at the private expense of G. C.; that for the purpose of giving it permanence, elevation, and extensive usefulness, he desired, with the aid of others, to endow and place it under the direction of a board of curators who should conduct it on the principle of its foundation, namely: as an institution purely literary, affording instruction in ancient and modern languages, the sciences, and the liberal arts, and not including or supporting by its funds any department for instruction in systematic or polemic theology, nor instituting any regulations which should render a place in its classes offensive to reasonable, liberal-minded persons, whatever might be their religious opinions. Provision was made for the organization of the board, for filling vacancies, and expelling members for cause, and other necessary and usual powers given for the ends of the organization. Ten years subsequently an act of the legislature amending the charter provided that the concurrence

¹ Vincennes University v. Indiana, 14 How. 268, TANNEY, C. J., and CATRON and DANIEL, JJ., dissenting. "That a college established for the promotion of education and for instruction in virtue and piety, and in the liberal arts and sciences, is in some sense a public institution or corporation cannot be denied; for it is for the benefit of the public at large, or at least for all persons who are suitable objects of the bounty, and this is the popular sense in which the language is commonly used. And in this sense an institution founded exclusively by private donors for purposes of general charity, such as a hospital for the poor, the sick, the disabled, or the insane, may well be called a public institution. But in the sense of the law, a far more limited as well as more exact meaning is

intended by a public institution or corporation. That a college, merely because it receives a charter from the government, though founded by private benefactors, is not thereby constituted a public corporation controllable by the government, is clear beyond any reasonable doubt. Nor does it make any difference that the funds have been generally derived from the bounty of the government itself." STORY, J., in *Allen v. McKean*, *supra*. See *Story on Contr.*, sec. 1392. It was held in Georgia that the State might constitutionally pass an act controlling the management of an eleemosynary corporation endowed wholly by the State, by changing the mode of electing trustees and suspending those in office. *Dart v. Houston*, 22 Ga. 506.

of the Missouri Annual Conference of the Methodist Episcopal Church, South, should be requisite in filling all vacancies in the board, upon the Conference affording to the board satisfactory assurances for the maintenance and endowment of the college. It was held that the amendment, by requiring the concurrence in the choice of curators of an ecclesiastical body representing one of the religious denominations of the State, endangered in this regard the principles of the foundation, changed the character of the administrators of the trust, hindered the free choice of their successors according to the will of the founder by the men to whom he had entrusted his bounty, and essentially impaired the obligation of the contract.¹ Institutions of this character "are, strictly speaking, lay and not ecclesiastical, even though composed of ecclesiastical persons, and although they in some things partake of the nature, privileges, and restrictions of ecclesiastical bodies."² A society incorporated "For the Propagation of the Gospel in Foreign Parts," endowed solely from the benefactions of those who chose to bestow them, empowered to purchase and receive real estate in fee to a certain annual value, estates for life and for years, and personal property, is a private eleemosynary corporation, although created by a charter from the crown for the administration of a public charity.³ A corporation exclusively devoted to the support and education of the deaf and dumb, and sustained by the donations of individuals and the public, those who are indigent being

¹ State v. Pittman, 44 Mo. 570.

² 1 Blk. Com. 471. Such was the corporation created in the reign of Queen Anne, under the name of "The Governor of the Bounty of Queen Anne for the Augmentation of the Maintenance of the Poor Clergy." 1 Kyd. on Corp. 27.

³ Soc. for Prop. Gospel v. New Haven, 8 Wheat. 464. Some corporations "are

constituted for public and others for private charities. The former are not subject to any founder or particular statutes, but to the general laws and statutes of the realm by which they are maintained and supported. But private charities are subject to the rules and ordinances of the founder." Holt Ch. Anon. 3, Salk. 102.

received and maintained gratuitously, while from such as are able to pay, compensation is required, is a corporation for charitable purposes.¹ A corporation was created for the support of aged indigent females. Its funds were derived from voluntary donations, and it had no capital stock or provision for making dividends or profits, and the services of its managers were rendered without charge. The managers were authorized by vote to admit inmates on such terms as under the circumstances of each case seemed proper; but excepting when otherwise ordered, each inmate was required to pay \$150 before admission; and inmates having property before, or acquiring it after admission, were obliged to make it over to the corporation. It was held that the institution was a mere charity, and that an inmate who was removed for a violation of the rules, had no legal ground of complaint.²

But an association, the object of which was, by loans or advances of money, to aid its members in obtaining insurances on their lives, to assist them in making payments thereon, and in providing their families with immediate funds in case of death, was held not within an act for the incorporation of benevolent and charitable societies.³ The

¹ *Am. Asylum v. Phoenix Bank*, 4 Conn. 172.

² *Gooch v. Assoc. for the Relief of Aged and Indigent Females*, 109 Mass. 558. The money and property required from the inmates went to supplement the charitable fund, and fell short of what they received.

³ *People v. Nelson*, 10 Abb. Pr. N. S. 200. The act in question was "For the incorporation of benevolent, charitable, scientific, and missionary societies." Where a corporation was created for the "improvement and welfare" of the members, and particularly for their mutual relief "in times of sickness and distress," it was held that a provision in the articles of association for the

widows of deceased members was within the scope of the general purposes of the organization. *Gundlach v. Germania Mechanics' Assoc.*, 4 Hun, 339. In 1862, when the husband of the plaintiff, afterward deceased, became a member of a voluntary charitable association, the by-laws provided that each member paying the regular assessment should be entitled to twenty-five cents a day during his sickness, and the widow of each deceased member the same, so long as she should remain a widow. Before his death, the society having been incorporated, the charter provided that the society might alter or change the by-laws. Subsequent to his decease, the corporation adopted a by-

National Savings Bank of the District of Columbia "is not a commercial partnership, nor is it an artificial being, the members of which have property interests in it, nor is it strictly eleemosynary. Its purpose is rather to furnish a safe depository for the money of those members of the community disposed to entrust their property to its keeping. It is somewhat of the nature of such corporations as church-wardens for the conservation of the goods of a parish, the college of surgeons for the promotion of medical science, or the society of antiquaries for the advancement of the study of antiquities. Its purpose is a public advantage without any interest in its members. The title of the act incorporating it indicates its purpose, namely: an act to incorporate a national savings bank; and the only powers given to it are those we have mentioned,—powers necessary to carry out the only avowed purpose, which was to enable it to receive deposits for the use and benefit of depositors, dividing the income or interest of all deposits among its depositors or their legal representatives. It is like many other savings institutions incorporated in England and in this country during the last sixty years intended only for provident investment, in which the management and supervision are entirely out of the parties whose money is at stake, and which are benevolent, and most useful, because they hold out no encouragement to speculative dealing or commercial trading. . . . Among the earliest are some in Massachusetts, organized under a general law passed in 1834, which contained a provision like the one in the act of Congress, that the income or profit of all deposits shall be divided among the depositors with just deduction

law providing that each widow should receive twenty-five cents a day until she had received \$200, which sum the plaintiff had received. It was held that as the regulation limiting the widow's share in the charity was made by

a general law, applicable to all, and there was no suggestion of fraud, or that the regulation was not wise and salutary, the plaintiff was not entitled to recover beyond the amount already paid her. *Figure v. Mu. Soc.*, 46 Vt. 362.

of reasonable expenses. Indeed, until recently, the primary idea of a savings bank has been that it is an institution in the hands of disinterested persons, the profits of which, after deducting the necessary expenses of conducting the business, inure wholly to the benefit of depositors in dividends, or in a reserved surplus for their greater security.”¹

§ 21. *Quasi corporations.*—There is a distinction between proper aggregate corporations, and such as are created with powers for a few specified purposes only. The latter, in the books, are sometimes called *quasi* corporations.² There are many instances in the laws of collective bodies of men, coming under one general description, endowed with a corporate capacity in some particulars expressed, but who have in no other respect the capacities incident to a corporation.³ The statutes 4 and 5 Wm. 4th, ch. 69, sec. 3, providing for suits against the West Cork Mining Company, and 1 Vict., ch. 88, sec. 8, making it lawful, upon the recovery of judgment, to levy the amount on the property of the company, were held to constitute the company a *quasi* corporation.⁴ A State “is a legal being, capable of transacting some kinds of business like a natural person, and such a being is a corporation.”⁵ Counties are mere *quasi* corporations, invested with corporate powers *sub modo*, and for a few specified purposes only, but deficient in many of the powers incident to the general character of corporations;⁶ though in substance and legal effect, the

¹ Huntington v. Savings Bank, 96 U. S. 388.

² Adams v. Wiscasset Bank, 1 Me. 361.

³ Jackson v. Hartwell, 8 Johns. 422.

⁴ Harrison v. Timmins, 4 M. & W. 510.

⁵ State of Indiana v. Woram, 6 Hill, 33, per BRONSON, J.

⁶ Hannibal & St. Joseph R.R. Co. v. Marion County, 36 Mo. 294; Ray County v. Bentley, 49 Id. 236; Smith

v. Myers, 15 Cal. 33; People v. Sacramento County, 35 Id. 692; Goodnow v. Commrs. of Ramsey County, 11 Minn. 31; School Dist. v. Thompson, 5 Id. 286; Louisville, etc., R.R. Co. v. County Ct. of Davidson, 1 Sneed, Tenn., 637. A county is not liable, at common law, to a private action at the suit of a party injured, resulting in the non-performance by its officers of a corporate duty. Granger v. Pulaski County, 26 Ark. 37. Counties and towns being

board of supervisors of a county is the corporation, they being, so to speak, the board of directors and managing agents of the county.¹ In Pennsylvania, the commissioners of a county, who are the public agents of the county as to money matters, are a *quasi* corporation;² and in Ohio, the board of commissioners of a county, being clothed by the statute with the capacity of suing and being sued, is a corporation for special purposes.³ At common law, every parish and town was a corporation for local necessities, and every collective body of men who, although not a body politic and corporate, with the general powers of a corporation, yet having a corporate capacity for particular specified ends, was deemed a *quasi* corporation, with limited powers, coextensive with the duties imposed upon it by statute.⁴ In New York and Illinois, the supervisor of a town;⁵ and in South Carolina, the board of commissioners of roads are *quasi* corporations.⁶ By the New York

subdivisions of the State, their officers are its local agents; and their powers may be revoked or enlarged, and their acts be set aside, at the pleasure of the legislature, without their consent, or even without notice. *St. Louis v. Russell*, 9 Mo. 507; *Russell v. Reed*, 27 Pa. St. 170; *Burns v. Clarion County*, 62 Id. 425; *People v. Pinkney*, 32 N. Y. 393; *Laramie County v. Albany County*, 92 U. S. 307.

¹ *Supervisors v. Bowen*, 4 Lansing, 24; *Lawrence County v. Chattaroi R.R. Co.*, 81 Ky. 225.

² *Van Kirk v. Clark*, 11 Serg. & Rawle, 286.

³ *Comms. v. Gherky*, Wright R. 493; *Board of Commrs. v. Mighels*, 7 Ohio St. 109.

⁴ *Clarissy v. Metrop. Fire Dept.*, 7 Abb. Pr. N. S. 352. In New York, previous to the Revised Statutes, there were no incorporating acts for towns and counties.

⁵ *Jansen v. Ostrander*, 1 Cowen, 670;

Palmer v. Vandenbergh, 3 Wend. 193; *Denton v. Jackson*, 2 Johns. Ch. 325; *Bradley v. Case*, 4 Scam. 585. The colonial laws of New York considered towns as corporations. *North Hempstead v. Hempstead*, 2 Wend. 109. "There is not any very close correspondence between the nature and object of the organization of towns in the State of New York and that of parishes in England." "While the former were exclusively political in their character, the latter were primarily ecclesiastical, and only incidentally political, through the connection in England between the church and the government. But again, towns were known in England, and recognized as political bodies distinct from parishes. There the town and vill were synonymous, and a single parish might and did embrace a number of towns." *Morey v. Town of Newfane*, 8 Barb. 645, per SELDEN, J.

⁶ *Comms. of Roads v. McPherson*, 1 Speer, 218.

Revised Statutes, county superintendents of the poor are declared to be a corporation by the name of the superintendents of the poor of the county in which they are appointed, with the usual power of a corporation for public purposes, and some special powers.¹ In the same State, and also in Mississippi, overseers of the poor of a town are a *quasi* corporation, being public agents and trustees of the town in respect to their poor, having necessarily, without express authority from the legislature, capacity to sue commensurate with their public trusts and duties, and *pro tanto* endowed with a corporate capacity.² School districts are *quasi* corporations with limited powers coextensive with the duties imposed upon them by statute or usage, but restrained from a general use of the authority which belongs to their metaphysical persons by the common law.³ In New Hampshire it was said: "School districts are *quasi* corporations of the most limited powers known to the laws. They have no powers derived from usage, their existence extending back but a few years. They have the powers expressly granted them, and such implied powers as are necessary to enable them to perform their duties, and no more. Among these are the power to vote money for specified purposes, and the power to appoint committees to carry their votes relative to those purposes into effect. The district may, clearly, by their votes for building and repairing school-houses, limit the expense to a definite sum; and they may limit the precise repairs, or the exact description of the school-house to be built, and it seems very clear that no committee can bind the dis-

¹ N. Y. Rev. Sts., 7th ed., p. 1855; *Pomeroy v. Wells*, 8 Paige, ch. 406; *Van Keuren v. Johnston*, 3 Denio, 183.

² *Rouse v. Moore*, 18 Johns. 407; *Todd v. Birdsall*, 1 Cowen, 260; *Grant v. Fancher*, 5 Id. 309; *Governor v. Gridley*, Walk., Miss. 328.

³ *Inhabs. of School Dist. v. Wood*, 13 Mass. 192; *Wharton v. School Directors*, 42 Pa. St. 358; *Com. v. Beamish*, 81 Id. 389; *Beach v. Leahy*, 11 Kansas, 23; *School Dist. v. Williams*, 38 Id. 454; *People v. Dupuyt*, 71 Ill. 651; *People v. Trustees of Schools*, 78 Id. 136.

trict by exceeding those limits.”¹ In New York and Mississippi the trustees of a school district are a *quasi* corporation.² When a union free school district has been organized in the former State, and trustees duly chosen pursuant to the statute of 1864, the board thus formed is created a body corporate.³ The board of education of the city of Rochester is a corporation only to a qualified extent. It has continuity, although the commissioners who exercise its powers are changed annually. It can make no contracts except for the disbursement of money raised, received, and appropriated by law, and subject to its order for expenditure during each current school year, or which may remain in the treasury unappropriated by previous boards.⁴ In Alabama an early statute provided that the school commissioners of each township and the trustees of each school district for the time being and their successors should be corporations.⁵ Where an act makes certain individuals with their successors public agents to receive and disburse the county school fund, and provides that all moneys due and to become due for the use of the school fund shall be payable to their order, and that they shall possess full and complete power and exclusive control over this fund, “to have, demand, receive, hold, vest, and reinvest the same in behalf and for the benefit of the primary schools and for the promotion of education in said county,” they are a *quasi* corporation.⁶ At common law *quasi* corporations might change their names and alter their boundaries without working a destruction of their rights or franchises or cancelling their duties and liabilities. In Wisconsin districts are made by statute corporations for certain specified

Harris v. School District, 28 N. H. (8 Fost.) 58.

² Williams v. Keech, 4 Hill, 168; Horton v. Garrison, 23 Barb. 176; Carmichael v. Trustees, etc., 3 How. Miss. 84; Littlewort v. Davis, 50 Miss. 403.

³ Bassett v. Fish, 75 N. Y. 303.

⁴ People v. Lathrop, 19 How. Pr. 358.

⁵ School Commrs. v. Dean, 2 Stew. & Port. 190.

⁶ O'Neal v. School Commrs., 27 Md. 227.

purposes, and their names and boundaries can be changed.¹ An act of the legislature which makes it the duty of the supervisors of a county to set apart a portion thereof as a levee district with corporate powers, constitutes the levee district when thus organized a corporation.² The Metropolitan Fire Department, embracing the cities of New York and Brooklyn, is a *quasi* corporation.³ The levy court of Washington county in the District of Columbia is a *quasi* corporation. Its functions are those which in the several States are performed by county commissioners, overseers of the poor, county supervisors, and similar bodies having other designations.⁴

The General Assembly of the Presbyterian Church is not a *quasi* corporation. It is a segregated association which, though it is the reproductive organ of corporate succession, is not itself a member of the body, and has no corporate quality.⁵ Manufacturing corporations under the

¹ School District v. Macloon, 4 Wis. 79.

² Dean v. Davis, 51 Cal. 406.

³ Clarissy v. Metrop. Fire Dept., 7 Abb. Pr. N. S. 352.

⁴ Levy Court v. Coroner, 2 Wall. 501.

⁵ Com. v. Green, 4 Whart. 531. Mr. Brice speaks of *quasi* municipal bodies, "including under this head the various local government boards, the sanitary authorities, and the other authorities for local administrative purposes. The many bodies which have been called into being and incorporated for the carrying out or the supervision of works or other matters of general or national importance, such as the commissioners for river, sewage, navigation, and the like purposes, dock or turnpike trustees; those whose aims are of a somewhat charitable nature, *i. e.*, friendly, provident, benefit, and similar societies, which may be con-

veniently grouped under one head as co-operative associations; anomalous associations existing for worldly, as opposed to religious or charitable purposes, but not designed for gain, such as the council of law reporting, the corporation of foreign bondholders. Between these various and dissimilar societies there is no difference in legal consideration. Whatever be the aims of any group of men, in every case, if the group be endowed with the legal marks of a corporation, it is such, having the privileges, but also subject to the incapacities of a corporation. But besides these, various other bodies exist, having some, but wanting others, of the characteristics of true corporations aggregate. These are commonly designated *quasi* corporations. Such, for instance, are most of the commissions instituted for public purposes, and which have been referred to above. These are either made corporations to

act of New York of March 11, 1811, were in effect mere partnerships, with some of the powers and privileges of corporations. They resembled the corporations of the civil law, which were voluntary associations, and little more than limited partnerships.¹

all intents, or so far erected into corporations that the powers given to them, the duties imposed on them, and the rights of action acquired by them, descend to their successors." He instances as *quasi* corporations sole the

Lord Chancellor of England and the chief-justices of the king's and common bench. Green's Brice's *Ultra Vires*, 2d Am. Ed., 19, 20.

¹ Penniman v. Briggs, Hopkins Ch. R. 300.

CHAPTER III.

MODE AND EVIDENCE OF CREATION.

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| § 22. Power to create under the Roman law. | § 34. Exact conformity with provisions of act not required. |
| 23. At common law. | 35. Charter must be accepted. |
| 24. Power to create in the United States | 36. Mode of acceptance. |
| 25. Constitutional provisions. | 37. Proof of acceptance. |
| 26. General legislative power. | 38. Evidence in general of corporate existence. |
| 27. Delegation of power. | 39. Corporations by prescription. |
| 28. Language of statute. | 40. Corporations by necessary implication. |
| 29. Statutory construction. | 41. Admissions and declarations. |
| 30. Materiality of corporate name. | 42. Legislative recognition of corporation. |
| 31. Wrongful adoption of name. | 43. Date of incorporation. |
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| 33. Essential preliminary steps. | |

§ 22. Power to create under the Roman law.—By the civil law, according to Blackstone,¹ corporations were created by the mere act and voluntary association of their members, provided such convention was not contrary to law and the prince's consent was not necessary. Domat, however,² says that communities or assemblies of many persons united in one body could not be lawfully formed in Rome without the prince's permission; and Browne contends³ that under the civil law, although common mercantile partnerships or temporary societies, formed to promote the interests of particular persons and to continue during their lives, were erected by the mere act and voluntary association of the members, yet public and permanent communities, intended to be perpetual like our corpora-

¹ 1 Blk. Com. 472.

² Civ. L., tit. 2, sec. 2.

³ Civ. L. 143, 144.

tions, were formed by the permission or grant of the prince or by a decree of the Roman senate.

§ 23. **At common law.**—By the common law of England the power to create corporations with franchises belonged to the king as a branch of the royal prerogative, and the immediate creative act was usually performed by the king alone. Bacon says:¹ “The king, by virtue of his prerogative, is the only person that can erect either an ecclesiastical or lay corporation. Yet the king may give power to a common person to name the corporation and the persons it is to consist of; but when he hath so done, this corporation does not take its essence from the common person, but from the king.” By 39 Eliz., ch. 5, every person seized of an estate in fee simple may, by deed enrolled in the high court of chancery, erect a hospital or house of correction, which shall be incorporated and have perpetual succession, and shall be visited by such persons as shall be nominated by the founders thereof. Corporations created by royal charters “have existed in such various forms, and with so many combinations of powers, privileges, and immunities, that it is almost impossible to say what is or is not a corporation by the common law by merely referring to the existence of any particular power, right, or privilege as appertaining to an association or community of individuals.”²

Although Parliament sometimes granted acts of incorporation, it was generally in those cases where some extraordinary powers and privileges were wanting not within the reach of the king's prerogative. Even then the rule held good that no corporation was valid without the royal sanction, for the assent of the king was necessary to every parliamentary act.³ Anciently the king was not the only

¹ Bacon's Abr., tit. Corp. B. See opinion of CATON, C. J., in *St. Louis, Alton & Chicago R.R. Co. v. Dalby*, 19 Ill. 353.

² WALWORTH, Chancellor, in *Warner v. Beers*, 23 Wend. 103.

³ *Williams v. Bank of Michigan*, 7 Wend. 539.

person who might without the authority of the legislature have created corporations. During the latter part of the Saxon period, and for some time after the Conquest, the great nobles exercised prerogatives within their own demesnes similar to those which the king exercised, and, among these, the power of conferring corporate privileges on their towns.¹ At a later period, however, the king possessed the exclusive prerogative of incorporating companies, and in the reign of Edward III. his assent to the creation of any corporation was held to have been long established as the settled law.²

§ 24. **Power to create in the United States.**—It is the sovereign power alone which can create corporate franchises.³ In this country the people, the only legitimate sovereigns, have succeeded to the prerogatives which formerly belonged to the crown. With us statutory incorpo-

¹ 1 Kyd on Corp. 41, 42, quoting from Millar on the English Government, 379, 380. "Cities and towns were first erected into corporate communities on the Continent and endowed with many valuable privileges about the eleventh century, to which the consent of the feudal sovereign was absolutely necessary, as many of his prerogatives and revenues were thereby considerably diminished." 1 Blk. Com. 472, *note*, referring to 1 Robertson's Chas. V. 30.

² 1 Kyd on Corp. 44. "At the time of the Reformation, in consequence of the statute of Edward VI., which gave the colleges therein described to the king, it generally became a question whether the house claimed was a lawful college, the determination of which depended on the authority by which it was established. In the case of Greystock College, it appeared that Pope Urban, at the request of Ralph, baron of Greystock, founded a college of a master and six priests resident at Greystock,

and assigned to each of the priests five marks per annum, beside their bed and chamber, and to the master 40*l.* per annum; and it was certified into the book of first-fruits and tenths that this college was in being within five years before the making of the statute; and it was resolved by the justices that this reputative college was not given to the king by that statute, because it wanted a lawful beginning and the countenance also of a lawful commencement, for that the pope could not found or incorporate a college within this realm, nor assign, nor license others to assign, temporal livings to it; but that it ought to be done by the king himself, and by no other." Ibid. 44, 45; Dyer, 81, Pl. 64.

³ Comyn Dig., tit. *Franchises*; State v. Bradford, 32 Vt. 50; Stone v. Flagg, 72 Ill. 397. Acting as a corporation without right is an offense at common law. Kinder v. Taylor, 3 L. J. 68. See Duvergier v. Fellows, 5 Bing. 248; Josephs v. Peber, 1 Carr & P. 507.

rations are legislative grants by the people through their representatives, rather than laws in the ordinary sense of the term.¹ The power to create a corporation, though appertaining to sovereignty, is not a substantial and independent power, but only the means of carrying into effect powers which are sovereign. When the exercise of such power is appropriate and not prohibited by the Constitution, its propriety is a matter of legislative determination.² The legislature cannot rightfully confer upon a corporation privileges or grant it exemptions which it cannot constitutionally confer upon or grant to a natural person. The person, whether natural or artificial, to whom the privilege is granted, is bound, upon accepting it, to render to the public the service which was the inducement of the grant; and the express or implied undertaking on the part of the grantee to do so will uphold the grant, no matter how inadequate the service may be. For the legislature being vested with power to make grants of that character when the public convenience demands it, the legislative judgment is conclusive, both as to the necessity of making the grant and the amount of service to be rendered in consideration therefor; and the courts have no power to interfere, however inadequate the consideration or unreasonable the grant may appear to them to be.³ Where, therefore, a State constitution gives to the legislature the power to create any corporations by special charter, the courts cannot review

¹ *Williams v. Bank of Michigan*, 7 Wend. 539; *Atkinson v. Marietta & Cincinnati R.R. Co.*, 15 Ohio St. 21.

² *Bell v. Bank of Nashville*, Peck, Tenn. 269; *McCulloch v. State of Md.*, 4 Wheat. 316. See *Thompson v. Pacific R.R. Co.*, 9 Wall. 579.

³ *Gordon v. Winchester Building Assoc.*, 12 Bush, Ky. 110. "The legislative bodies of this country have, from time immemorial to the present day, continued to grant to persons and

corporations exclusive privileges,—privileges denied to other citizens,—privileges which do not come within any just definition of the word monopoly. . . . Nor can it be truthfully denied that some of the most useful and beneficial enterprises set on foot for the general good have been made successful by means of these exclusive rights and could only have been conducted to success in that way." MILLER, J., in *Slaughter-House Cases*, 16 Wall. 36.

the exercise of that discretion.¹ To create an inviolable contract with the State by the passage and acceptance of a charter, it must invest the corporation with an absolute right of property, or confer such authority as, when exercised, vests the corporation with such rights of property or interest as are of some appreciable value, and which therefore cannot be taken from the corporation by subsequent legislation against its consent. But the legislature has the power to enact any subsequent or amendatory law which regulates the remedy for enforcing corporate rights and privileges, or which only operates on the relations between the corporation and other persons before any contract between them has been concluded, and interferes with no vested rights of the corporation.² Corporations are sometimes created by the mere passage of a statute. But, more frequently, the statute declares and points out the mode in which the legal body may thereafter be brought into existence.³

¹ *U. S. Trust Co. v. Brady*, 20 Barb. 119. An act giving an association powers and privileges which it can exercise and enjoy only as a body, incorporates the association for that purpose. *Nashville v. Ward*, 16 Lea, Tenn. 27.

² *Chattaroi R.R. Co. v. Kinner*, 81 Ky. 221. When the Constitution of a State grants a privilege to a corporation, it cannot be taken away by an act of the legislature. *New Orleans v. Houston*, 119 U. S. 265.

To bind a corporation by acts alleged to amount to an adoption or acceptance of new legislation affecting its charter, it must clearly appear that they were done in pursuance and recognition of the same. *Miss. & Rum River Boom Co. v. Prince*, 34 Minn. 79. Where an attempt to become incorporated is ineffectual upon any contract which the parties may be found

to have authorized to be made, or which they may have ratified, although the contract in terms was made as that of the association or assumed corporation, the members may be held to individual responsibility. *Hess v. Werts*, 4 Serg. & Rawle, 356; *Pettis v. Atkins*, 60 Ill. 454; *Bigelow v. Gregory*, 73 Id. 197; *Garnett v. Richardson*, 35 Ark. 144; *Kaiser v. Lawrence Sav. Bank*, 56 Iowa, 104; *Abbott v. Omaha Smelting Co.*, 4 Nebraska, 416; *Field v. Cooks*, 16 La. Ann. 153; *Jessup v. Carnegie*, 44 N. Y. Super. Ct. 260; *Johnson v. Corser*, 34 Minn. 335.

³ *Proprs. of Southold v. Horton*, 6 Hill, 501. The power of municipal corporations may be increased or diminished by the legislature, and this may be done by an act not professing in terms to amend their charters. *Robertson v. City of Rockford*, 21 Ill. 451; *Coles v. County of Madison*,

§ 25. **Constitutional provisions.** — The Constitution of Tennessee¹ confers upon the legislature exclusive power to create corporations to be exercised only when it may be deemed expedient for the public good. No corporation can be created or its powers increased or diminished by special laws, but provision is required to be made by general laws for the organization of corporations, which laws may at any time be altered or repealed.² Under the Constitution of Michigan no charters can be granted, but all private corporations must be organized under general laws and conform strictly to all the conditions imposed.³ Of course, a constitutional provision that the legislature shall pass a general law for the organization of corporations remains inoperative until the legislature acts upon it.⁴ In Georgia, under the Constitution of 1868, it is competent for the legislature to incorporate by one act several separate and distinct corporations, or to revive by name several charters which have become obsolete.⁵ Where the

Breese, 120; *People v. Morrell*, 21 Wend. 679; *Wilcox on Corp.* 26, secs. 11, 12; *Story's Com. on Const.*, 260; *People v. Wren*, 4 Scam. 269; *Sloan v. State*, 8 Blackf. 361; *City of St. Louis v. Russell*, 9 Mo. 503.

¹ Art. 11, secs. 7, 8.

² See *State v. Armstrong*, 3 Sneed, 634; *Morristown v. Shelton*, 1 Head, 24.

³ *Doyle v. Mizner*, 42 Mich. 332.

⁴ *Virginia City v. Chollar Potosi Mining Co.*, 2 Nevada, 86.

⁵ *Conner, ex parte*, 51 Ga. 571; *King v. Banks*, 61 Id. 20. This is an exception to the general rule. *Falconer v. Campbell*, 2 McLean, 195. The Constitution of Georgia declares that the legislature "shall have no power to grant corporate powers and privileges to private companies except banking, insurance, railroad, canal, navigation, mining, express, lumber,

manufacturing, and telegraph companies." Section 1676 of the code prescribes the manner in which the courts shall exercise the power of incorporating certain companies, and section 1677 prescribes the manner in which certain other companies may be incorporated by the courts. See *Matter of Deveaux*, 54 Ga. 673. In Pennsylvania the act of 1791 provided that when any number of persons, citizens of the State, desired to be incorporated for any literary, charitable, or religious purpose, articles of association should be prepared by them and submitted to the attorney-general, who, after examining the articles, was required to transmit them to the Supreme Court, and the court was required to indorse thereon a certificate touching the lawfulness of the objects of the articles and transmit the same to the Governor, and if the attorney-

Constitution of a State provided that corporations might be formed under general laws, but should not be created by special act except for municipal purposes, it was held that the restriction related not only to the grant of a charter, but also to the conferring on a corporation any powers and franchises by special act, and that an act granting to certain persons and their assigns powers and privileges in case they should organize themselves within a specified time into a corporation under the general laws, was a special act within the meaning of the prohibition.¹ But such a constitutional prohibition would not be violated by an act prolonging the existence of a corporation.² Under the clause in the Constitution of New York,³ which provides that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title," it is not necessary for the title of an act of incorporation to set forth all of the powers of the company. So long as the objects of the corporation are limited by the act to one body corporate, they constitute in mass the single subject which the act must contain, and it is sufficient that the title by reciting the name of the company thereby indicates its character.⁴ In New York, corporations may be formed under general laws, but cannot be created by special act except for municipal purposes and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws.⁵

general and the court certified a favorable opinion the Governor was required to transmit the same to the master of the rolls, and the association thereupon became a body corporate. See *Case of Medical College*, 3 Wharton, 445; *Case of St. Mary's Church*, 7 Serg. & Rawle, 517.

¹ *San Francisco v. Spring Valley Works*, 48 Cal. 493.

² *Cotton v. Miss., etc., Boom Co.*,

22 Minn. 372. Extending the time during which a corporation may exist is not the creation of a new corporation. *Ibid.*

³ N. Y. Const., art. 3, sec. 16.

⁴ *Freeman v. Panama R.R. Co.*, 14 N. Y. Supm. Ct. 122.

⁵ Const. of New York of 1846, art. 8, sec. 1; Const. of 1881. There is a similar provision in the Constitution of Oregon, art. 11, sec. 2.

§ 26. **General legislative power.**—As a rule, whenever Congress or the legislature of a State has a constitutional right to accomplish a certain object which can best be attained by means of a corporation, it may create such a corporation, and endow it with the powers necessary to effect the desired object.¹ “The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation ; but a corporation is created to administer charity. No seminary of learning is instituted in order to be incorporated ; but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated ; but it is incorporated as the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else.”²

Corporations originating according to the rules of the common law must be governed by it in their mode of organization, in the manner of exercising their powers, and in the use of the capacities conferred ; and when a corporate body claims its origin from such a source, the rules of the common law must be regarded in deciding upon its legal existence.³ The legislature may, however, create a corporation, not only without conforming to the rules of the com-

¹ See *McCulloch v. State*, 4 Wheat. 316 ; *Osborn v. Bank of U. S.*, 9 Id. 738 ; *Thomson v. Pacific R.R. Co.*, 9 Wall. 579 ; *Williams v. Croswell*, 51 Miss. 817 ; *Farmers', etc., Nat. Bank v. Dearing*, 91 U. S. 29.

² *McCulloch v. State*, *supra*, per MARSHALL, C. J.

³ *Penobscot Boom Corp. v. Lamson*, 16 Me. 224.

mon law, but in disregard of them ; and when a corporation is thus created, its existence, powers, capacities, and the mode of exercising them must depend on the law of its creation.¹ Of course the purpose of incorporation must be promotive of, and not hostile to, the public interests. The Legislature of North Carolina during the late civil war enacted that certain persons named and others who had contributed a certain sum, or might thereafter contribute a like sum, to be invested and the interest thereon expended for the education of the indigent orphans of such soldiers as had fallen or might thereafter fall or be disabled in the wars of the Confederate States, and when no such claimants existed, then of other orphan boys to be selected as far as practicable from the counties in proportion to the amount contributed by them, their assigns, and successors in office, should be a body politic and corporate, capable of taking by purchase, devise, or donation, real and personal estate, and of holding and conveying the same. It was held that the act of incorporation was void by reason of its manifest tendency to aid and encourage the then existing rebellion.²

The legislature may make such police regulations as may be necessary for the preservation of the public health, and create a corporation through which such police regulations may be enforced. Therefore an act giving to a corporation the exclusive right to maintain a slaughter-house, and to control the inspection of all animals slaughtered for the market in a city, without excluding any person from purchasing or butchering live stock and selling the meat in

¹ *Penobscot Boom Corp. v. Lamson*, 16 Me. 224.

² *Endowment Fund v. Satchwell*, 71 N. C. 111. *RODMAN and READE, JJ.*, dissented on the ground that the inducement held out to join or adhere to the rebellion was trivial, remote, and

contingent ; and that even if the particular trust for the orphans of soldiers could not be sustained, the other trusts which were separable from that and free from objection, ought to be upheld and the act of incorporation deemed valid.

the markets of the city, is not unconstitutional.¹ A statute creating a corporation may be void because it is a special act, and for that reason unconstitutional, and yet operate as a legislative license or authority, and therefore a defense to the parties named in the act if prosecuted for doing what the language and plain intent of the act authorized them to do.²

A corporation cannot be created beyond the territorial limits of the State exercising such power. When, therefore, an act was passed by the Legislature of Michigan, after the adoption of the Constitution of that State, and before her admission into the Union, attempting to create a corporate body in the territory then in dispute between Ohio and Michigan, which territory was afterward decided to belong to Ohio, it was held that the act was void.³ A corporation created by the State of Virginia did not become a corporation of West Virginia by its formation to carry on mining and manufacturing operations in territory which afterward became a part of West Virginia, but only by complying with the provisions of the act of the latter State recognizing corporations then existing there.⁴ A

¹ *State v. Fagan*, 22 La. Ann. 545; *Slaughter-House Cases*, 16 Wall. 36. See *Live Stock, etc., Assoc. v. Crescent City, etc., Co.*, 1 Abb. U. S. 388.

² *Brent v. State*, 43 Ala. 297. See *Purdy v. People*, 2 Hill, 31; 4 Id. 384; *People v. Morris*, 13 Wend. 325; *Atty. Genl. v. McArthur*, 38 Mich. 204; *Montgomery Mut. Building & Loan Assoc. v. Robinson*, 69 Ala. 413.

³ *Myers v. Manhattan Bank*, 20 Ohio, 283. In *Day v. Newark India Rubber Manuf. Co.*, 1 Blatchf. 628, NELSON, J., said: "We think it quite clear that a corporate body created by the law of a sister State can have no corporate existence beyond the limits of the territory within which the law creating it can operate; and that when and where

the law ceases to have any force and effect, this legal entity and mere creature of the law ceases to have any existence. If the law should be abrogated by the legislature creating it, it would cease to exist in the jurisdiction within which it was created, the law bringing it into existence and upholding it being no longer in force; and for the like reason it can never have any legal being or existence extraterritorial, where the law creating it never had any operation or force."

⁴ *Kanawha Coal Co. v. Kanawha & Ohio Coal Co.*, 7 Blatchf. 391. "Strictly speaking, a corporation can have no local residence or habitation. Created by law, and known by the legal capacities conferred upon it, it ex-

State may make a corporation of another State as there organized and conducted, a corporation of its own as to any property within its territorial jurisdiction.¹ Where charters are granted to two canal companies of the same name by the legislatures of adjoining States, and subsequently a union of their interests is effected by acts passed in each State, there is not a merger of the separate corporate existence of the corporations, but simply the creation of a unity of stock and interest.²

It was held that the Legislature of the Territory of Missouri had power to create a corporation,³ and it seems that the Legislature of Indiana possessed the same power.⁴ It is now, however, provided by act of Congress that the legislative assemblies of the several Territories shall not grant private charters or special privileges; but they may, by general acts of incorporation, permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits, or for the construction or operation of railroads, wagon-roads, irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, libraries, or any benevolent, charitable, or scientific association.⁵

"If a State have a right to make grants, it must of necessity prescribe the terms upon which they shall be made. If it may limit their duration, it may also impose other restrictions. It may determine how much or how little, how large or how small an estate or franchise it will grant. It

ists only in the recognition of the rights and franchises it may claim. Wherever the law is recognized from which its franchises are derived, there it exists. It extends to the territorial limits of the jurisdiction which granted its charter, which, for judicial purposes, defines its locality." *Glaise v. So. Car. R.R. Co.*, 1 Strohh. 70.

¹ *Railroad Co. v. Harris*, 12 Wall.

65; *Railroad Co. v. Vance*, 6 Otto, 450.

² *Farnum v. Blackstone Canal Corp.*, 1 Sumner, 46.

³ *Riddick v. Amelin*, 1 Mo. 8; *Douglas v. Bank of Mo.*, *Ib.* 24.

⁴ *Vance v. Farmers' and Mechanics' Bank*, 1 Blackf. 80; *Vincennes University v. Indiana*, 14 How. 268.

⁵ U. S. Rev. Sts. 1873, 1874, sec. 1889.

may grant absolutely or on condition. So it may grant during pleasure or until a certain event happens. And if a grant be accepted on the terms prescribed, it becomes a compact, and the grantees can have no reason to complain."¹ The enjoyment of corporate rights may be extended by the legislature. Such an act would not give any new substantive rights, but would simply extend the time within which rights previously granted might be exercised.²

§ 27. **Delegation of power.**—The creation of a corporation may be an act of sovereign power exercised either mediately or immediately. In England it was formerly considered that the act of incorporation must be the direct act of the king, and that he could not authorize another to create a corporation. But the law has long been settled that he may not only grant a license to a subject to create a corporation, but give a general power by charter to create corporations indefinitely. It is said by Kyd that the chancellor of the University of Oxford had such a power, and that he had often exercised it in the incorporation of matriculated companies of tradesmen.³ In Maryland, before the American Revolution, municipal corporations were created by the lord proprietary.⁴ Charters of incorporation were also granted by the proprietaries of Pennsylvania under a derivative authority from the crown, and those charters have since been recognized as valid.⁵ We have seen in the preceding section that Congress by virtue of its general legislative powers may regulate the creation of corporations by the territories. In the absence of any constitu-

¹ NORTON, J., in *Crease v. Babcock*, 23 Pick. 334.

² *Matter of N. Y. Elevated R.R. Co.*, 70 N. Y. 327; *Cotton v. Miss., etc.*, Boom Co., 22 Minn. 372; *St. Paul Ins. Co. v. Allis*, 24 Id. 75. See *Atkinson v. Marietta, etc., R.R. Co.*, 15 Ohio St. 21.

³ 1 Kyd on Corp. 50. This statement of Kyd seems to have been copied by him from 1 Blackstone, 474, to which he refers.

⁴ *McKim v. Odom*, 3 Bland Ch. 416.

⁵ 3 Wilson's Lects. 409.

tional inhibition, it would doubtless be competent for a State legislature to give a general power to erect corporations. This power might be vindicated on the principle that *qui facit per alium, facit per se*; the persons to whom such power was delegated being only instruments in the hands of the Government.¹ When the power delegated is simply ministerial, its exercise cannot be successfully questioned.² An act for the incorporation of a railroad, which gave commissioners power to determine the need of such a road, to designate the route, and to direct the plan of construction, was held valid.³ In Missouri, a town having been incorporated by the county court pursuant to a general law, it was objected that the act conferring such power on county courts was unconstitutional, being a delegation of a political trust which could alone be exercised by the legislature. The court, in upholding the validity of the charter, said: "The duties imposed on the county courts in relation to this subject are judicial in their nature. They have no discretion. They have no authority to vest any power in the corporation. Their office is, upon the performance of certain acts by the inhabitants, to declare them incorporated if satisfied of the verity of the facts set forth, and then the law declares the powers of which the corporation shall be possessed. Such a mode of incorporation is becoming common."⁴ In an early case in New York, it was said by the court that the legislature of that State had always exercised the right to pass general statutes authorizing associations of individuals to incorporate themselves on complying with certain provisions, and that although these corporations had generally been for re-

¹ Green v. Graves, 1 Doug. Mich. 351.

³ Matter of N. Y. Elevated R.R. Co., 70 N. Y. 327.

² Franklin Bridge Co. v. Wood, 14 Ga. 80; Matter of Deveau, 54 Id. 673; Matter of Spring Valley, etc., Co., 17 Cal. 136.

⁴ Keyser v. Trustees of Bremen, 16 Mo. 88. See People v. Nelson, 10 Abb. Pr. N. S. 200.

ligious, literary, or manufacturing purposes, yet that the same power must always have been understood to exist with reference to any other objects.¹

The capacity to have perpetual succession under a special name, and in an artificial form, to take and grant property, contract obligations, and sue and be sued as an individual, is inalienable in the hands of the artificial being when created; but it has no power to transfer its own existence into another body, nor can it enable natural persons to act in its name save as its agents, or as members of the corporation acting in conformity to the modes required or allowed by its charter.² In England, at an early period, corporations exercised the right to create other corporations. In the latter part of the sixteenth century the mayor, aldermen, and sheriff of Newcastle-on-Tyne incorporated a fellowship of cooks, giving them perpetual succession and the power to sue and be sued; and the mayor, aldermen, and sheriff of the same city incorporated a company of coopers.³ It is safe to presume that no such power would be conferred on a corporation at the present day.

§ 28. Language of statute.—In general, no particular form of words is required to create a corporation. A grant to a person and his successors and a grant to a body of men to hold mercantile meetings were held to confer corporate capacity. Many instances are to be found in the books of grants to inhabitants of a town that they should be a free borough and enjoy various privileges, which have been considered as constituting them a corporate body.⁴ It was said by COWEN, J., in an early case in New York, that he could not see the force of the argument that because

¹ *Thomas v. Dakin*, 22 Wend. 108, v. *Estwick*, Salk. 193; *Fazakerly v. per COWEN, J.* See *Medical Inst. v. Wiltshire*, Strange, 462.

² *Atkinson v. Marietta, etc., R.R.* Denton v. Jackson, 3 Johns. Ch. 320; *Co., 15 Ohio St. 21.* Com. v. Westchester R.R. Co., 3

³ *Grant on Corp.* 12. See *Cudden Grant's Cas.* 200.

⁴ *Bac. Abr.*, tit. Corporations, B. See

the legislature had constantly avoided to call certain associations or their machinery a corporation, therefore the court could not adjudge them to be so; that if they had the attributes of corporations, if they were such in the nature of things, the court could no more refuse to so regard them than it could refuse to acknowledge John or George to be natural persons, because the legislature might, in making provisions for their benefit, have been pleased to designate them as belonging to some other species.¹ The word "corporation" was not used in the New York general banking act of 1838, yet the institutions organized under it were held to be corporations.² An act which provides that certain persons named, with their associates and successors, "are hereby made and constituted a body politic and corporate," and as such may sue and be sued, prosecute and defend, hold real and personal estate not exceeding fifty thousand dollars at any one time, grant and vote money, and "have all the powers and privileges, and be subject to all the liabilities incident to a corporation of a similar nature," gives all the attributes of a corporation and none of a simple association. It may not have stock; and, if not, it can have no stockholders. But that is not essential to a corporation.³ As applied to corporations, every grant of franchises is a charter. It may be the grant of a mere franchise of being a corporation, or a grant of powers to a corporation already in existence. In either case the grant is the company's charter to exercise the rights and privileges and enjoy the immunities granted.⁴

§ 29. **Statutory construction.**—The first question to be determined, if the alleged or assumed fact is controverted, will be whether or not a corporation has been created. A

¹ Thomas v. Dakin, 22 Wend. 9.

³ Weymouth v. Penobscot Log Driv-

² See Case of Waterbury Union Ex-
press Co., 3 Abb. Pr. N. S. 163; Ma-

ing Co., 71 Me. 29.

honey v. Bank of Ark., 4 Ark. 620;
Liverpool Ins.Co. v. Mass., 10 Wall. 566.

⁴ State v. Commr. of Railroad Taxa-
tion, 37 N. J. 228.

grant of corporate power should be expressed in plain and unequivocal language, showing that such was the intention of the legislature. If the intention be left doubtful, it will be construed against the claim of the parties setting it up.¹ In Ohio an act to establish and maintain an agricultural and mechanical college created a board of trustees to be appointed by the Governor with the advice and consent of the Senate, and committed to the board the government, control, and general management of the affairs of the institution; authorized the board to make contracts for the benefit of the college, to maintain actions, and to exercise other powers similar to those conferred on bodies corporate. It was held that the board of trustees did not thereby become a corporation. The court remarked that similar powers, but perhaps less extensive because less required, had been conferred on the trustees of the various hospitals for the insane, and on the board of managers of the Ohio soldiers' and sailors' orphans' homes and other institutions of the State.² A general law providing that corporations may be created for "hunting, fishing, or lawful sporting purposes" does not authorize the incorporation of a company for the purpose of suing for infractions of the game laws.³ But a statute of California,⁴ having provided for the formation of corporations for manufacturing, mining, mechanical, wharfing, and dockage, or chemical purposes, or for the purpose of engaging in any species of trade or commerce, foreign or domestic, it was held that the business of supply-

¹ *Pennsylvania R.R. Co. v. Canal Commissioners*, 21 Pa. St. 9. See *Myers v. Irwin*, 2 Serg. & Rawle, 368; *Gregory v. Shelby College*, 2 Metc. Ky. 589; *Cass v. Manchester Iron & Steel Co.*, 9 Fed. Rep. 640; *New Orleans Banking Assoc. v. Wiltz*, 10 Id. 330.

² *Neil v. Board of Trustees, etc.*, 31 Ohio St. 15.

³ *Ancient City Sportsman's Club v.*

Miller, 7 Lansing, 412. The following resolve of the executive council of Massachusetts, "Advised that a company of artillery be established at Watertown agreeably to the military law," was held not to constitute the company a corporation. *Shelton v. Banks*, 10 Gray, 401.

⁴ Act of April 14, 1853, as amended by act of April 30, 1855.

ing the inhabitants of a city with water for an equivalent consideration to be received, was engaging in a species of trade or commerce within the meaning of the act.¹ The first section of a law chartering a fire insurance company enacted that ten persons named and the subscribers to the stock of the company and their successors should be a body politic and corporate; the second section fixed the amount of the capital stock and the number of shares into which it was to be divided; the fourth section provided that as soon as three thousand shares were subscribed and paid or secured to be paid, the company should be competent to transact business; the fifth section enacted that after the subscription of three thousand shares, ten persons named should be directors of the company until their successors were elected, and such of them as were present at the first meeting were required to proceed to organize the company by electing a president and secretary. By the fifteenth section the persons named in the first section were required, as soon as practicable after the passage of the act, to open books for subscription to the capital stock. It was held that the procurement of the requisite number of shares was essential to the existence of the corporation, and that previous to this no officers could be chosen.² *Crocker v. Crane*³ was in relation to the charter of a railroad company under the act of New York of 1832, ch. 129, the first section of which provided that three persons named and such other persons as should thereafter become stockholders were constituted a body corporate and politic. The capital stock was fixed at a certain amount, and by subsequent sections provision was made for obtaining subscriptions through the agency of commissioners, who were to meet after a stated period, and if more than the given

¹ *Honeyman v. Blake*, 19 Cal. 579.

² *Franklin Fire Ins. Co. v. Hart*, 31 Md. 59.

³ 21 Wend. 218.

amount had been subscribed, they were to distribute the stock to the several subscribers in such manner as they should deem for the best interests of the corporation. It was held that the awarding and distribution of the stock were conditions precedent to the existence of the corporation.

In construing the powers of corporations organized under statutory provisions, reference is to be had to the enabling act and to the general laws applicable to the corporation under consideration, and whatever can be fairly and reasonably implied as incidental to the objects for which the corporation is created may be taken as granted.¹ "Undoubtedly the main business of a corporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted. But it may also enter into contracts and engage in transactions which are incidental or auxiliary to its main business, or which may become necessary, expedient, or profitable in the care and management of the property which it is authorized to hold under the act by which it was created."² When the corporate powers are enumerated, the exclusion of all others is implied; but this will not exclude the exercise of such powers as are incident and essential to the enjoyment of the powers enumerated. A grant of special privileges in derogation of common right must be strictly construed.³ The validity of acts performed by a corporation under a claim of the rightful exercise of its powers when called in question can usually be

¹ *Thomas v. Railroad Co.*, 101 U. S. 71; *Relfe v. Rundle*, 103 Id. 222; *Green Bay & Minn. R.R. Co. v. Union Steamboat Co.*, 107 Id. 98.

² *Brown v. Winnisimmet Co.*, 11 Allen, 326, per BIGELOW, C. J. See *Jones v. Guaranty, etc., Co.*, 100 U. S. 622; *Taylor v. Phila. & Reading R.R. Co.*, 7 Fed. Rep. 386.

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³ *Richmond, etc., R.R. Co. v. Louisiana R.R. Co.*, 13 How. 71; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Rugles v. Illinois*, 108 Id. 526; *Tyng v. Commercial Warehouse Co.*, 58 N. Y. 308; *State v. Krebs*, 64 N. C. 604; *Babcock v. N. J. Stock Yard Co.*, 20 N. J. Eq. 296.

readily determined from the obvious intention of the legislature and the objects of the incorporation, as shown by the statutes upon which the corporation relies for its existence, the general rule being to construe charters liberally.

§ 30. **Materiality of corporate name.**—Every corporation must have a name by which it may be known and distinguished; for the name is the “knot of its combination,” without which it could not exercise its corporate functions.¹ It is the only designation of the corporation or of the members composing it. The latter are sufficiently indicated by the corporate name, and any other designation or description would be superfluous.² It was stated by Sir Edward Coke that a name was as essential to a corporation as the baptismal name to a natural person.³ But such a comparison is not strictly correct; for although every man and woman must have a name by which they can be identified, and so must a corporation, yet, while the change or omission of a letter in a Christian name, as Olive for Oliver, would materially alter the name, the name of a corporation frequently consists of several descriptive words, and the transposition of them, or an interpolation or omission, or alteration of some of them, might make no particular difference in the sense.⁴ Thus, a note made payable to “The

¹ 1 Blk. Com. 475; Bac. Abr., tit. C.; Glass v. Tipton, etc., Turnpike Co., 32 Ind. 367. In Connecticut, it is enacted that “the corporate name of every corporation hereafter organized otherwise than by special charter shall commence with the word *The*, and end with the word *Company*, or *Corporation*.” Genl. Sts. of Conn. 1875, p. 277. In Colorado, the corporate name is required to commence with the word *The*, and end with the word *Corporation*, *Company*, *Association*, or *Society*, and indicate by the name the business to be carried on by the corporation. Genl. L. of Col. 1877, pp. 143, 144. In West Virginia,

it is provided by statute that “no joint stock company shall adopt the same name which is being used at the time by another corporation.” Code of West Va. 1868, p. 395.

² Trustees, etc., v. Parks, 10 Me. 441. “A bishop or person acting in a corporate capacity and holding property to him and his successor in right of his office, has no need of a corporate name.” Overseers v. Sears, 22 Pick. 122.

³ Co. 28, 29. See Glass v. Tipton Turnp. Co., 32 Ind. 376.

⁴ See 1 Kyd on Corp. 227; Chadsey v. McCrary, 27 Ill. 253; Bac. Abr., tit. Corporations, C.

President, Directors & Co., of the Newport Mechanics' Manufacturing Company," was held recoverable in an action brought by "The Newport Mechanics' Manufacturing Company."¹ So, where a bequest was made to "The Franklin Seminary of Literature and Science, Newmarket, N. H.," and the only seminary at Newmarket was incorporated by the name of "The Trustees of the South Newmarket Methodist Seminary," it was held that parol evidence was admissible in explanation.² Where land was dedicated to the use of a religious society, and an edifice for public worship erected thereon, and the grant was made to "The Particular Baptist Church," it was held that the society by afterward changing its name to "The United Baptist Church," did not impair its right to the property.³

Less strictness as to the exact name is required in contracts, leases, bonds, and grants made by or to corporations, than in actions brought by or against them; and still less in a devise or bequest.⁴ "The general rule to be collected from the cases is, that a variation from the precise name of the corporation, when the true name can be collected from the instrument, or is shown by proper averments, will not

¹ *Newport Mech. Manf. Co. v. Stairbird*, 10 N. H. 123.

² *Trustees, etc., v. Peaslee*, 15 N. H. 317. Describing the Union Bank of Calcutta, a joint stock copartnership, in a promissory note, as "The Proprietors of the Union Bank of Calcutta," was held immaterial. *Forbes v. Marshall*, 22 Eng. L. & Eq. 589.

³ *Cahill v. Bigger*, 8 B. Mon. 211.

⁴ *Northwestern Distilling Co. v. Bryant*, 69 Ill. 658; *Insane Asylum v. Higgins*, 15 Id. 185; *Preachers' Aid Soc. v. Rich*, 45 Me. 552; *First Parish in Sutton v. Cole*, 3 Pick. 322; *Institution for the Blind v. How*, 10 N. Y. 84; *Hammond v. Shepard*, 29 How. Pr. 188; *Clement v. Lathrop*, 18 Fed. Rep. 885; *Romeo v. Ayer*, 60 Pa. St. 430; *Mil-*

ford, etc., Turnp. Co. v. Brush, 10 Ohio, 111; *Pendleton v. Bank of Ky.*, 1 Mon. 177; *Middletown v. McCormick*, *Pennington Rep.* 2d ed. 378; *Inhabs. v. String*, 5 Halst. 323. When in a conveyance to a corporation the name of the corporate body is not correctly stated, the deed is valid, notwithstanding the grantor was ignorant that the grantee was a corporation. *Ashville Div., No. 15, v. Aston*, 92 N. C. 578. Where the charter of a turnpike company required subscriptions to the stock to be made to "The President, Managers, and Company," and they were made to the "Managers and Company," omitting the word "President," it was held sufficient. *Hagerstown Co. v. Creeger*, 5 Har. and Johns. 122.

invalidate a grant by or to a corporation, or a contract with it; and the modern decisions show an increased liberality on the subject. For a corporation to attempt to set aside its own grant, by reason of a misnomer in its own name, was severely censured, and in a great measure repressed, as early as the time of Lord Coke."¹ If a corporation cannot avail itself of such misnomer, neither can a member of the corporation.² The objection that a promise in writing was to pay a certain sum to the "New York Central College," while the name of the corporation was the "New York Central College Association," was held untenable, it having been proved that the college was known by both names.³ An obligation or promise was to pay to "The Branch Bank of the State of Arkansas at Arkansas." The true name of the corporation was "The Bank of the State of Arkansas." The question was whether the words added before and after the true name were such as varied it substantially, and constituted in fact a different obligee, or were such as only made a mere verbal difference, but were in substance and effect the same as the true name of the corporation. Held the latter, and that therefore the promise was binding upon the parties.⁴ If J. S. Abbot,

¹ 2 Kent's Com., 8th ed., p. 341. See *Hoboken Building Assoc. v. Martin*, 13 N. J. Eq. 427; *Franklin Av. Savings Inst. v. Board of Education*, 75 Mo. 408.

² *Hyatt v. McMahon*, 25 Barb. 457.

³ *Hammond v. Shepard*, 29 How. Pr. 191.

⁴ *Bower v. Bank of the State*, 5 Ark. 234. In this case the court said: "The law incorporating the Bank of the State of Arkansas has been held by this court to be a public law and the bank to be at least a *quasi* public corporation. We are, therefore, bound to know judicially that there is a branch of said bank at Arkansas, and that it is but a portion or integral part of said

corporation. Consequently, everything done by or to those intrusted with the management of its business at said branch in respect thereto, must be considered as done by or to the corporation, because being but an integral part of the whole, it can have no existence separate from and independent of the corporation of which it is a member only, and therefore those who act therein cannot act for or as the agents of that particular branch only, but must act for and as the agents of the whole corporation, notwithstanding their powers may be restricted, so that they can only act in reference to such portion of the business thereof as shall be transacted at that particular

of B., make a lease in the name of J. S. Clericus, of B., it is good.¹ A grant of John Abbot, of N., by the name of William Abbot, of N., was held valid.² The corporate name of a grantor was the Kentucky Seminary. The deed was made in the name of the Kentucky Academy. It was executed by the chairman of the board of trustees of the Kentucky Seminary. There was no such corporation in existence as the Kentucky Academy at the time the deed was executed. It was held that the variation was insufficient to invalidate the conveyance.³ The name of a corporation was "The Chartered Fund of the Methodist Episcopal Church in the United States of America." Property was devised to "The Trustees of the Chartered Fund of the Methodist Episcopal Church located in Philadelphia." It was held that as the corporation was located in Philadelphia, and no claim to the property was set up by any other institution, the corporation was entitled to take under the will.⁴ In ascertaining the intent of the contracting

branch or place. This the parties were bound to know and must be presumed to have known when the obligation or promise was made."

¹ Bac. Abr., tit. Corporations.

² Ibid.

³ Ky. Seminary v. Wallace, 15 B. Mon. 35.

⁴ Vansant v. Roberts, 3 Md. 119. In 1794 an act was passed incorporating the rector, wardens, and vestry of the Episcopal church in Dedham. In 1818 a new act was passed incorporating certain persons therein named and the proprietors of pews in the same church, giving them control over the property, and repealing all other acts relating to the same subject. This latter corporation took the name of the Dedham Episcopal Church, and assumed the payment of all unsettled and outstanding accounts and claims, either in favor of or against the church,

which accrued under the first act. It was held that the new corporation was not in a situation to deny its identity with the original one. Episcopal, etc., Soc. v. Episcopal Church in Dedham, 1 Pick. 372. Where a mortgage on real estate was executed in the name of a religious society by the president, secretary, and trustees, but it was not shown what name had been given to the corporation, it was held that it would be presumed that the corporate name was the one in which the mortgage was given. Meth. Epis. Church of Kendallville v. Shultze, 61 Ind. 511. The terms "Congregational persuasion" and "Congregational denomination," when used in connection with the denominational name of a religious society, signify the church polity, and not any system of doctrine. Case of Town of Dublin, 38 N. H. 459.

parties or testator, it is proper to show by what name the corporation was generally known and called by the parties, upon the same principle as evidence given to show in what sense particular terms are used in a will or other instrument.¹ If a deed be made to a corporation by a name varying from the true name, the plaintiffs may sue in their true name, and aver in the declaration that the defendant made the deed to them by the name mentioned in the deed. An allegation in the declaration that the defendants acknowledged themselves to be bound unto the plaintiffs by the description, etc., is equivalent to such an averment.² A corporation having been sued by a correct name, and judgment entered up against it in that name, but execution issued thereon in a different name, it was held that the variance was material.³ Where in an indictment for arson the building burned was described as the property of the "Phoenix Mills Company," and it was proved that the name of the corporation was "The Phoenix Mills of Seneca Falls," it was held that the defect was fatal.⁴ The name of a corporation may be acquired by usage.⁵

A corporation may have more than one name.⁶ It may have one name in which to contract, grant, etc., and another in which to sue and be sued. So it may be known by two different names, and be sued by either.⁷ It has been said

¹ *McGary v. The People*, 45 N. Y. 153.

² *N. Y. African Soc. v. Varick*, 13 Johns. 38.

³ *Bradford v. Water Lot Co.*, 58 Ga. 280.

⁴ *McGary v. The People*, *supra*.

⁵ *Smith v. Plank R. Co.*, 30 Ala. 650.

⁶ *Knight v. Wells*, 1 Ld. Raym. 80; *Shrewsbury v. Hart*, 1 Car. & P. 113; *Minot v. Curtis*, 7 Mass. 441; *Medway Cotton Manuf. Co. v. Adams*, 10 Id. 360; *Commercial Bank v. French*, 21 Pick. 486; *Milledge v. Boston Iron*

Co., 5 Cush. 158; *Hammond v. Shepard*, 29 How. Pr. 188. "A corporation created within memory can regularly have but one name, and in all legal proceedings the true name must be used." ALLEN, J., in *McGary v. People*, 45 N. Y. 153. The fact that a voluntary religious society constituted under the laws of a State without a special legislative act of incorporation has borne different names, does not affect its identity. *Wardens, etc., v. Hall*, 22 Conn. 125.

⁷ *Thomas v. Dakin*, 22 Wend. 73, per NELSON, C. J.

that "there seems to be no reason why an act of Parliament might not empower a corporation by charter to use two names for the same purpose."¹ The only material circumstance is a name or names of some kind by which it is known, and in which all its affairs may be conducted. Although the name of a corporation may seem to express only a certain number of individuals by their name of office, yet in all lawful acts and legal proceedings it must be taken to mean the whole corporate body.²

A corporation cannot of itself, like a partnership, or simple joint stock trading company, take a new name; such a change requiring the same power that created the corporation. It might perhaps so adopt a name in the transaction of its business as to be made liable in its true name upon transactions in its assumed name; but it must then be sued by its true name.³ The identity of name is the principal means for effecting the perpetuity of succession, which is an important purpose of incorporation. The title to shares, the liability on contracts, and the right to assets, would be in danger of confusion if the name were subject to such change.⁴

Notwithstanding a clause in the constitution of a State that "corporations may be formed under general laws that shall not be created by special acts except for municipal purposes," the legislature may change the name of a corporation, and give it power to purchase additional property, no new corporate powers or franchises having been created.⁵ In a case in California,⁶ this question was considered, but

¹ 1 Kyd on Corp. 230. See *College of Physicians v. Salmon*, 3 Salk. 102; *Conro v. Port Henry Iron Co.*, 12 Barb. 27. See *Wells v. Oregon R.R.*, etc., Co., 15 Fed. Rep. 561.

² *Ibid.*

³ *McGary v. People*, *supra*.

⁴ *Regina v. Registrar*, 10 Adol. & Ell. 839; *Morris v. St. Paul*, etc., R.R. Co.,

19 Minn. 528; *Dubuque & Minn. R.R. Co. v. Keisel*, 43 Iowa, 39. A mere change or abbreviation of the name would not necessarily destroy the identity of the corporation. *Girard v. Phila.*, 7 Wall. 1.

⁵ *Wallace v. Loomis*, 97 U. S. (7 Otto) 146.

⁶ *Pacific Bank v. De Ro.*, 37 Cal. 538.

not determined. The court said: "The mere changing the name of a corporation is not, as it appears to us, the creation of a corporation in the sense of the constitution. As suggested by the counsel for the plaintiff, it would seem that the changing of the name of a corporation is no more the creation of a corporation than the changing of the name of a natural person is the begetting of a natural person. The act, in both cases, would seem to be what the language which we use to designate it imports, a change of name and not a change of being." Where, after a corporation was created, a subsequent legislature changed its name without altering its powers, it was held not a valid objection as between the company and third persons, as the identity of the corporate body could be shown.¹

In Tennessee, courts of chancery are clothed by statute with authority to change the name of any private corporation upon application and good reason shown by the directors.² In Maine, a corporation may, at a legal meeting of stockholders, vote to change its name and adopt a new one; and when the proceedings of such meeting, certified by its clerk, are returned to the office of the Secretary of State, to be recorded by him, the name will be deemed changed.³

§ 31. **Wrongful adoption of name.**—Property in a name is a well-recognized right of the civil law, and suits are said to be common in France and Scotland to enforce such rights and prohibit their infringement. The name of a corpora-

¹ Rosenthal v. Madison, etc., Plank R. Co., 10 Ind. 538. An act permitting a railroad company to change its name and extend its road does not create a new corporation. Atty. Genl. v. Joy, 55 Mich. 94.

² Act of Tenn. of 1871, sec. 11.

³ Rev. Sts. of Me., ed. of 1871, p. 394, sec. 5. See Trustees of Northwestern College v. Schwagler, 37 Iowa,

577; *In re* First Presbyterian Church of Bloomfield, 111 Pa. St. 156. The New York Code, sec. 1777, provided that in an action or special proceeding by or against a corporation, a mistake in the corporate name would be deemed to have been waived, unless the misnomer was pleaded by the defendant in the answer or other pleading.

tion will be protected upon the same principle that protection is afforded in the use of a trade-mark. The ground of relief is the injury to the party aggrieved, and the imposition upon the public. This does not necessarily depend upon the question of fraud or evil intent, the *quo animo* not being material; for the natural and necessary consequence of the wrongful appropriation of a corporate name must be, in some degree at least, to injure the business and rights of the corporation by destroying or confusing its identity.¹ "The act is an illegal one, and must, if necessary, be presumed to have been done with an intent to cause the results which naturally flow from it. Nor will a court of equity refuse to enjoin the wrongful appropriation of a corporate name, until the right of the first corporation to the name has been established by the verdict of a jury in an action at law. Such right does not rest in parol, but is shown by the record, if at all, and is determined by the court in any form of proceeding. Neither in such case has the party injured an adequate and complete remedy at law. As in the case of patents for inventions and copyrights, the remedy at law can only give redress for the past injury, and that often inadequately. But to protect the injured corporation from the mischief arising from the continued violation of its rights and from perpetual litigation concerning them, resort must be had to the equitable remedy by injunction."² The petitioners stated that they wished to organize as a corporation for charitable and benevolent purposes, under the name and style of "The Ladies' Good Samaritan Society of Nashville." The application was opposed by a corporation previously chartered under the name of "The Nashville Ladies' Good Samaritan Society, No. 2," which did not object to the incorporation of the petitioners under any other name than the one chosen, but

¹ Holmes v. Holmes Manf. Co., 37 Conn. 278.

² DEADY, J., in Newby v. Oregon Centr. R.R. Co., Deady R. 609. See Story's Eq. Juris., sec. 930.

contended that to allow them to be incorporated under the name sought would lead to confusion and dispute, and prove an injury to both. The court of chancery, to which the petition was presented, and which, under the statute of Tennessee, was clothed with power to organize corporations, held that the petitioners, if they wished to be incorporated, must take a different name, but that a slight change in the name would be sufficient.¹ Of course, when in such a case there is a complete remedy at law, an injunction will not be granted.² A court of equity will not lend its aid to restrain a company from using a name in the transaction of its business, which name it adopted as that of a corporation before the complainant was organized as a corporation under the same name, although the defendant no longer acts in the capacity of an incorporated body, but continues its business as a partnership.³ Where a corporation takes the name of four of its principal stockholders, a corporation afterward organized cannot lawfully adopt the same name, although the principal stockholders in the first company are also members of the second.⁴

§ 32. Where there are two corporations of the same name. —Similarity of name of officers or of members, or even of objects, cannot of itself establish the identity of corporations created at different times by different charters. To ascertain whether a charter creates a new corporation or merely continues the existence of an old one, its terms must be considered, and a construction given them consistent with the legislative intent, and the intent of the incorporators. The existence of a bank was limited by its charter. Afterward, while the old bank was still in existence, a bank of the same name was incorporated, with a capital less in amount by several thousand dollars than that of the old

¹ Walker, *ex parte*, 1 Tenn. Ch. 97.

² Ottoman Cahvey Co. v. Dane, 95

³ London Soc. v. London Ins. Co., 11 Ill. 203.

Jur. 938.

⁴ Holmes v. Holmes Manf. Co., *supra*.

bank. The second charter referred to the old bank as an existing corporation, and declared that "any director of the old bank may be eligible as a director of the bank hereby established." It further declared that the new bank might take, receive, and hold, by assignment, any mortgages possessed by the old bank, which might be assigned and taken by agreement between the two corporations. It was held that there was abundant evidence that the legislature contemplated the erection of a new corporation, although the same persons were president, cashier, and directors in both banks.¹

Notwithstanding a corporation is chartered in two different States by the same name and style, with the same capacities and powers, and intended to accomplish the same objects, there is a distinct and separate corporate body in each State.² Where two companies were chartered with the same name in adjoining States, to construct a canal in each State; and afterward, by virtue of several acts, the corporations acquired a unity of interests, it was held that they did not cease to exist as distinct corporations; the union being merely of interests and stocks, and not a surrender of personal identity by either corporation.³

§ 33. **Essential preliminary steps.**—When the statute creating a corporation provides that, to entitle it to exercise corporate powers, something shall be done by it *in futuro* to establish the existence of the corporation, it must be shown that the act has been performed, or there must, at least, be proof of user under the charter.⁴ If a corporation be organized under a general law, the articles of association must conform strictly to the law in specifying the objects of the incorporation, and all of the conditions be observed.⁵

¹ *Bellows v. Hallowell & Augusta Bank*, 2 Mason, 31. And see *Wyman v. same*, 14 Mass. 58.

² *Ohio & Miss. R.R. Co. v. Wheeler*, 1 Black. 286.

³ *Farnum v. Blackstone Canal Corp.*, 1 Sumner, 46.

⁴ *Fire Department of N. Y. v. Kip*, 10 Wend. 266.

⁵ *West v. Bullskin Prairie Ditching*

Where a statute authorized three or more persons who had entered into articles of agreement in writing for the transaction of certain kinds of business, to organize in a prescribed manner, and thereby become a corporation, it was held that written articles of agreement were necessary to constitute a corporation, and that these articles must fix the amount of the capital stock, and set forth distinctly the purpose for which, and the place in which, the corporation was established.¹ "There is an obvious reason for making such organization by written articles of agreement a condition precedent to the exercise of corporate rights. It is the basis on which all subsequent proceedings are to rest, and it is designed to take the

Co., 32 Ind. 138; *O'Reiley v. Kankakee Draining Co.*, Ib. 169.

¹*Utley v. Union Tool Co.*, 11 Gray, 139. In Texas, corporations may be created by the voluntary association of three or more persons. A charter must be prepared, setting forth the name of the corporation; the purpose for which it is formed; its place of business; the term for which it is to exist; the number of its directors or trustees, and the names and residences of those appointed for the first year; the amount of its capital stock, if any, and the number of shares into which it is divided. The charter must be subscribed by three or more persons, two of whom at least must be citizens of the State, and be acknowledged by them, and be filed in the office of the Secretary of State. *Rev. Sts. of Texas*, ed. of 1879, pp. 95, 96, arts. 565, 567, 568, 569. In Connecticut, any number of persons not less than three may associate and become a body corporate where no capital stock is created. *Genl. Sts. of Conn.* 1875, p. 277. The same number is required in Arkansas. *Rev. Sts. of Ark.* 1874, pp. 626, 627, sec. 3333. In Illinois, there must not be less than three

nor more than seven persons. *Rev. Sts. of Ill.* 1874, p. 285. In Ohio, corporations may be formed for any purpose for which individuals may lawfully associate themselves, except for dealing in real estate, or carrying on professional business; and if the organization is for profit, it must have a capital stock. Any number of persons, not less than five, a majority of whom are citizens of the State, desiring to become incorporated, must subscribe and acknowledge, before an officer authorized to take acknowledgments of deeds, articles of incorporation, which must contain: 1. The name of the corporation; the place where it is to be located, or where its principal business is to be transacted; the purpose for which it is to be formed; the amount of its capital stock; and the number of shares into which the stock is divided. When an improvement is to be constructed, which is not to be located at a single place, the articles must set forth the kind of improvement intended, its termini, and the counties in which it or its branches will pass. *Rev. Sts. of Ohio*, ed. of 1880, secs. 3235, 3236, 3237.

place of a charter or act of incorporation by which corporate rights and privileges are usually granted. If there were no such requirement, there would be an absence of any provisions by which the right to exercise corporate power could be definitely fixed and established, and there would be no means of ascertaining the rights of stockholders or of persons dealing with such associations. . . . It is not a case of defective organization under a charter or act of incorporation, nor of erroneous proceedings after the necessary steps were taken to the assumption of corporate powers, but there is an absolute want of proof that any corporation was ever called into being which had the power of contracting debts or of rendering persons liable therefor as stockholders.”¹

The members of an insurance company, formed under the provisions of the statute, not having subscribed the articles of association or given public notice of its formation, name, and object pursuant to law, it was held that it had not become a corporation.² Under the Code of Iowa,³ providing that a corporation may commence business as soon as its articles are filed in the recorder's office, and that its doing so shall be valid if publication be made in a newspaper within three months, it was held that the publication of a notice of incorporation was material, and that without it the doings of the company would not be valid as corporate acts.⁴

¹ *Utley v. Union Tool Co.*, 11 Gray, 139, per BIGELOW, J.

² *Union Ins. Co. v. Crain*, 43 N. H. 636.

³ Sec. 1064.

⁴ *Eisfield v. Kenworth*, 50 Iowa, 389, ADAMS, J.: “It is objected to this view that it is unreasonable to suppose that the legislature would attach so much importance to the publication of notice. But where a body of men, large or small, contract a liability, but with the design of escaping individual

liability, there is much reason for providing not only that they shall provide for individual exemption by recorded articles, but shall publish to the world the fact that they claim such exemption. It is true that the publication could not be presumed to give actual notice to a very large number of those who may deal with the corporation. The publication need continue only four weeks, while the corporation may by renewal continue indefinitely. Still, the publication would tend to fix the

The Code of California¹ requires that the articles of incorporation shall, among other matters, set forth that a majority of the members of the association voted at the election. Where the certificate omitted any statement to that effect, it was held insufficient to constitute the association a corporation, and that the defect was not aided by an averment in the answer that in point of fact a majority of the members of the association did vote at the election.² In New York it was held that a railroad corporation was not legally constituted until all the requirements of the statute had been complied with and the articles filed in the office of the Secretary of State; that, until this was done, the subscription to the articles was a mere proposition to take the number of shares indicated by the subscription of the capital stock of the corporation thereafter to be formed, and not a binding promise to take and pay.³ Under the act of Illinois,⁴ relative to the formation of manufacturing corporations, providing that when the certificate of incorporation shall have been filed with the clerk of the court and a duplicate filed in the office of the Secretary of State, the clerk shall issue a license to the persons who signed and acknowledged the certificate, on the reception of which they and their successors shall be a body corporate, the signers of the certificate do not become a corporation by the making of the certificate, but only upon the reception of the license.⁵ Parties made and filed a certificate of incorporation, and entered into a written agreement to associate themselves for manufacturing purposes, and to contribute to the corporation certain property as capital stock. Subsequently a license was issued pursuant to the statute, but no stock-book was opened, nor any sub-

character of the corporators as doing business under a claim of individual exemption, and those who deal with them may properly enough be required to take notice of it."

¹ Sec. 594.

² *People v. Selfridge*, 52 Cal. 331.

³ *Burt v. Farrar*, 24 Barb. 518.

⁴ *Laws of 1857*, p. 161.

⁵ *Stowe v. Flagg*, 72 Ill. 397.

scription for stock made more than the written agreement, which, so far as it related to stock, was executory to take and put in stock at a future time. Stock was essential to the existence of a manufacturing corporation under the statute. It was held that the property had never been changed into corporate property, but belonged to the parties as an association of individuals under their written agreement.¹

§ 34. **Exact conformity with provisions of act not required.**—A substantial compliance with the requirements of the statute will be sufficient to show a corporation *de jure* in an action between the corporation and a private person.² A statute provided that "any number of persons, not less than three, who, by articles of agreement in writing, have associated or shall associate according to the provisions of this chapter, and who shall comply with all the provisions of this chapter, shall constitute a body corporate. Before any corporation, formed and established by virtue of the provisions of this chapter, shall commence business, the president and directors thereof shall cause their articles of association to be published," etc. It was held that the body might be a corporation for all the purposes of bringing an action without publication; that if the publication were omitted, the corporation might be restrained or wound up, but it would not enable a debtor to escape payment.³ A number of persons signed articles of association for a certain purpose, but did not describe themselves as inhabitants of any town or make any reference to the statute. They, however, provided in their articles for the annual election of a president, vice-president, secretary,

¹ Stowe v. Flagg, 72 Ill. 397.

Oroville & Virginia R.R. Co. v. Plumas Co., 37 Cal. 354.

Holmes v. Gilliland, 41 Barb. 568, SUTHERLAND, J., dissenting. The failure to describe the place of busi-

ness of a corporation as the "principal place of business" is a mere technical error, which does not avoid the charter. Spring Valley Water Works, *ex parte*, 17 Cal. 132.

treasurer, trustees, prudential committee, etc., to hold office until others should be elected, subject to removal by a vote of two-thirds of the members. As the object of the association was one expressly contemplated in the statute, the form adopted substantially conformed to the one prescribed, and no words were inserted indicating an intention not to form itself into a corporate body, it was held that it was a corporation under the statute.¹ In Massachusetts the object of a joint stock company, stated in the articles of association, was: "Manufacturing and selling daguerreotype mattings and preservers, and all other goods, wares, merchandise, and articles made of brass, silver, gold, iron, or other metals, or any compounds thereof." It was contended that the purposes of the association were not "distinctly and definitely specified," as required by the act under which it was organized, so that it never became a corporation. The objection, however, was not sustained, there being no legal objection to the manufacture by a single corporation of a great variety of articles.² Where all of the requirements of the statute were followed, except naming the directors in the articles of association, and that was done in effect by the adoption of the articles when the directors were elected, it was held sufficient; the provision that the directors be named in the articles being merely directory.³ The giving of a bond by the treasurer of the company for the faithful discharge of his duty is not essential to the creation of the body politic, but rather a precaution to be subsequently adopted for the benefit of the stockholders. It would seem indeed to be a security which could only be obtained after the corporation had come into existence, for if a bond is to be taken from one of its officers, the corporation must first act upon the subject and determine what shall be its terms and to whom it shall be

¹ Rogers v. Danby Universalist Soc., 19 Vt. 187.

² Bird v. Daggett, 97 Mass. 494.

³ Eakright v. Logansport, etc., R.R. Co., 13 Ind. 404.

given.¹ The grant of a charter to a person and his associates does not necessarily make it incumbent on him to take associates.² The term "associates" may mean those who are already associated with the persons named or those who may come in afterward. When the language is ambiguous, the question is one of construction as to legislative intent. If the grant be to one person who is at liberty to associate others and no provision is made for a division of the property into shares, for the call of a meeting, the choice of a clerk or other officer, or the keeping of records or any mode of organization, the inference will be that it was the intention of the legislature to permit one person or his successor to exercise all of the corporate powers.³ On the other hand, where persons are included in the act as recipients of the charter under the name of "associates," they must be actual associates and capable of being designated, identified, and ascertained to be such at the time of the granting of the charter. If articles of association were drawn and signed, the parties to it agreeing to unite in applying for an act of incorporation, and an act were passed conferring corporate powers on two or three of them and their associates, referring to the articles, the act would be deemed to apply to all who were named in the articles.⁴

§ 35. **Charter must be accepted.**—The charter of a private corporation, being in the nature of a contract, cannot be forced upon a body of persons who do not choose to accept it. Consequently, the mere enactment of a charter without acceptance does not create a corporation; and an offer of a charter until accepted may be withdrawn.⁵ "That a

¹ *Boston Acid Manuf. Co. v. Stetson*, 8 Me. 365. The recording of an official bond is not essential to its validity unless it be so expressly declared. *Burgess v. Pue*, 2 Gill, 254.

² *Hughes v. Parker*, 19 N. H. 181; s. c. 20 Id. 58; *Frost v. Frostburg Coal Co.*, 24 How. 278. The right to

receive associates presupposes a corporate organization. *Lechmere Bank v. Boynton*, 11 Cush. 369.

³ *Penobscot Boom Corp. v. Lamson*, 16 Me. 224.

⁴ *Lechmere Bank v. Boynton*, *supra*.

⁵ *Rex v. Vice-Chancellor*, 3 Burr, 1661; *Rex v. Askew*, 4 Id. 2200; *Rex*

man may refuse a grant, whether from the government or an individual, seems to be a principle too clear to require the support of authorities."¹ Where, by an act of the legislature, a corporation was created to be composed in the first instance of the members of several pre-existing companies, it was held that a member of one of the old companies, who did not expressly assent to the act, was not, by

v. Pasmore, 3 Term Rep. 240; Rutter v. Chapman, 8 Mees. & Welsb. 1; York & North Midland R.R. Co. v. Regina, 18 Eng. L. & Eq. 109; Dartmouth College v. Woodward, 4 Wheat. 688; Falconer v. Campbell, 2 McLean, 196; Canal Co. v. Railroad Co., 4 Gill & Johns. 1; Bailey v. The Mayor, 3 Hill, 543; Haslett v. Witherspoon, 1 Strobb. Eq. 209; Riddle v. Props., etc., 7 Mass. 187; Goshen & Sharon Turnpike Co. v. Sears, 7 Conn. 86; State v. Bull, 16 Id. 179; Alton R.R. Co. v. Dietz, 50 Ill. 210; Green v. Seymour, 3 Sandf. Ch. 285. The charter of a private corporation "is something more than a law, in that it contains stipulations which are terms of compact between the State as one party, and the corporators as the other, which neither party is at liberty to disregard or repudiate." COOLEY, J., in Flint, etc., Plank R. Co. v. Woodhull, 25 Mich. 99. An amendment or modification of a charter of a private corporation must be made by the parties to the contract, the legislature on the one hand, and the corporation on the other; the former expressing its intention by a legislative act, and the latter assenting thereto by a vote of a majority of the stockholders, or by other acts showing its acceptance. Yeaton v. Bank of the Old Dominion, 21 Gratt. 593. The charter of a municipal corporation goes into operation without acceptance, unless it is otherwise provided by the act of incorporation. Warren v. Charleston, 2 Gray, 84; Blessing v. Galveston, 42

Texas, 641; Alcorn v. Horner, 38 Miss. 652; City of Clinton v. Cedar Rapids, etc., R.R. Co., 24 Iowa, 455; People v. Salomon, 51 Ill. 53; Smith v. McCarthy, 56 Pa. St. 359; Barnes v. District of Columbia, 91 U. S. 540; Berlin v. Gorham, 34 N. H. 266; Mayor, etc., of Balt. v. State, 15 Md. 376. An indefinite number of inhabited houses near each other constitute a town, and a town may exist without or before either houses or people. Besides people and houses, and the territory on which they are located, the authority of law under which the affairs of the town may be regulated is necessary, and this must be derived from the legislature. The power of the legislature to provide a government for a town which is without one, does not necessarily depend upon the consent of even a majority of its inhabitants. Whatever assent might in theory or in principle be deemed requisite as the basis of legislation would be implied from the fact that the individuals concerned had placed themselves in a condition which required it. Cheaney v. Hooser, 9 B. Mon. 330.

¹ PARKER, J., in Ellis v. Marshall, 2 Mass. 268. See City of Paterson v. Society, etc., 4 Zab. 385. The offer may be withdrawn by an amendment of the constitution prohibiting both the State and corporators from giving assent to such a corporation. State v. Dawson, 16 Ind. 40. See Aspinwall v. Daviess County, 22 How. 364; State v. Roosa, 11 Ohio Sts. 16.

the mere force of the act, constituted a member of the new organization.¹

The act must be accepted, if at all, unconditionally.² Whether the charter be one of creation, or one granted to a pre-existing corporation, or the charter be amended, part of it, or part of the amendment, cannot be accepted and not the whole ; unless it is clearly the intention of the act that the grantees shall have the option to accept in part and reject in part.³ If there once be a valid acceptance of the charter, and the company organized thereunder, it cannot afterward be contended that there was no acceptance ; and a subsequent withdrawal of any of the corporators will not affect its vitality.⁴ The same principle of law applies to an act continuing a charter beyond its original term, as to the act which granted the charter ; that is, in both cases, the grant of chartered powers must be accepted.⁵

The rule that a charter, or an amendment thereto, must be either accepted or rejected, as offered, and without condition, and that, in accepting the privileges conferred, the grantees will be required to perform the conditions imposed, is applicable to subsequent conditions to be performed after the organization of the corporation, and not to conditions

¹ Gardner v. Hamilton Ins. Co., 33 N. Y. 421.

² Green v. Seymour, *supra*. The general principle is that he who accepts a charter, consents to whatever is contained in it. Lord Eure v. Strickland, Cro. Jac. 240 ; Bret v. Cumberland, Id. 399 ; Mayor of Lynn v. Henley, 1 Scott, 39, aff'd 2 Cl. & Fin. 331 ; Bushwick, etc., Co. v. Ebbets, 3 Edw. Ch. 353.

³ Rex v. Westwood, 4 Barn. & Cress. 781 ; Kenton County Ct. v. Bank Lick Turnpike Co., 10 Bush. Ky. 529. In King v. Amery, 1 Term Rep. 589, BULLER, J., said : " The averment proceeds on a mistake by supposing that a charter may be accepted in part and rejected as to the rest. The only in-

stance in which I have ever heard it contended that a charter could be accepted in part only, is where the king has granted two distinct things both for the benefit of the grantees. There, I know, that some have thought that the grantees may take one and reject the other. However that may be, it cannot extend to this case. This corporation must either have accepted *in toto* or not at all. If they could have accepted a part only of the charter, they would have been a corporation created by themselves and not by the king."

⁴ Busey v. Hooper, 35 Md. 15.

⁵ Lincoln & Kennebec Bank v. Richardson, 1 Me. 79.

precedent upon the strict performance of which the very existence of the corporation depends. By conditions precedent, are meant anything which, by the express provisions of the statute, is made a condition to be performed on the part of the corporators before and as a foundation for the exercise of powers and privileges under the charter.¹

The law protects a stockholder who, his assent being requisite to the amendment of a charter, has not assented. If a personal charge is sought to be fixed upon him by virtue of such amended charter, he will not be concluded by any presumption arising from the acts of the other corporators or of the corporate body. "But it cannot be permitted that a corporator, though his assent be in the first instance required, shall stand by consenting to the progress of a corporation under a charter, and then, when his interest may thus be promoted, set up either as a claim or defense that for want of his direct assent the grant of the charter was not effective, and that the acts done are illegal."² Where the powers of a corporation are enlarged by the legislature, with the assent of the members, one of them cannot, by withholding his consent, prevent the exercise of the enlarged powers.³ A reservation by the legislature of the power to amend a charter, does not imply the right to add new parties without the consent of the corporation.⁴ "Although moneyed corporations, composed of shareholders for whose use and benefit the charter is granted, may in general accept amendments, yet in charities, the corporators do not own the fund, neither is it held to their use; their consent would affect the property of others; and their office of visitors, so far from giving them power to authorize any change in its management and control, contrary to the will of the founder,

¹ Lyons v. Orange, etc., R.R. Co., 32 Md. 18.

² JHOLSON, J., in Owen v. Purdy, 12

Ohio St. 73. See Logan v. McAllister, 2 Del. Ch. 176.

³ Curry v. Scott, 54 Pa. St. 270.

⁴ Sage v. Dillard, 15 B. Mon. 340.

imposes upon them rather the obligation to see that that will is made paramount." ¹

§ 36. **Mode of acceptance.**—The grant must be accepted by a majority of the members of the proposed corporation.² Where an act constitutes several persons therein named a corporation, it is sufficient that a majority of such persons accepted the charter, those afterward uniting with the company signifying their assent by becoming members.³ The acceptance may be by the directors if assented to by the company.⁴ Where a railroad company by its directors voted to make an extension authorized by an act of the legislature amending their charter and caused the same to be recorded, it was held that these proceedings clearly showed an acceptance of the act.⁵ When the corporate existence is devolved on a board of officers, they not only wield the whole corporate authority, but may apply for and agree to radical changes in the instrument of their creation. If such a board be divided into integral parts occupying distinct positions, both must concur in any act having

¹ *State v. Adams*, 44 Mo. 570 per BLISS, J.

² *Com. v. Huston*, 7 Serg. & Rawle, 460; *St. Paul Division v. Brown*, 11 Minn. 356; *Taylor v. Commissioners of Newberne*, 2 Jones Eq. 141. Although a legislative alteration of the charter of a private corporation when merely auxiliary and not fundamental may be accepted by a majority of the incorporators, and such acceptance will bind the whole, yet if such alteration be fundamental, the acceptance must be unanimous. *State v. Accommodation Bank*, 26 La Ann. 288.

³ *Rex v. Amery*, 1 Term Rep. 575; *Day v. Stetson*, 8 Me. 865; *Penobscot Boom Corp. v. Lamson*, 16 Id. 224; *Charter of Nat. Military Asylum*, 11 Opin. Atty. Genl. 261. The king incorporated the tobacco-pipe makers in London, Westminster, England, and

Wales, and provided for the transaction of business at meetings in a hall in London or within three miles of that city, and authorized the master, wardens, etc., to make by-laws for the government of the society, of every member of it, and of every person using the art or mystery of making tobacco-pipes in London and Westminster and any other places in England or Wales. It was held that though the charter was inadequate to bind all the tobacco-pipe makers in the kingdom, it was competent to bind such of them as became members of the company. *Tobacco-Pipe Makers Co. v. Woodroffe*, 7 Barne & Cress. 838.

⁴ *Lincoln & Kennebec Bank v. Richardson*, 1 Me. 70; *Mutual Ins. Co. v. Stokes*, 9 Phila. 80.

⁵ *Bangor, etc., R.R. Co. v. Smith*, 47 Me. 34.

for its object an alteration of the fundamental law, though in the exercise of the ordinary powers of the corporation they act jointly and are governed by a majority of the united bodies. But where the whole body of stockholders or other persons in interest compose the corporation, the right of assenting to any proposed change in the charter resides in them, though ordinarily represented by a board of directors charged with the exercise of corporate powers.¹

There need not be a formal declaration of acceptance; but assent may be inferred from the conduct of the persons interested, as, for example, from the exercise of corporate powers under the statute, the election of officers, the holding of meetings, the adoption of by-laws, and other corporate acts.² It is customary at a meeting of the corporators called and held according to the provisions of the charter, after choosing a chairman and secretary of the meeting, to take a vote upon the question whether or not they will accept the charter. If the vote is in the affirmative, an organization takes place by the election of permanent officers and other acts important to carry into effect the objects of the company and a record thereof made.³ To make a vote of acceptance valid as the act of a corporation, it should be passed at a meeting duly convened after notice to all the members. The private procurement of a written assent signed by a majority of the members will not supply the want of a meeting.⁴ But a written acceptance of the charter, though not executed at a meeting, may

¹ *Com. v. Cullen*, 13 Pa. St. 133.

² *Rex v. Hughes*, 7 B. & C. 708; *Russell v. McLellan*, 14 Pick. 63; *Mu. Ins. Co. v. Stokes*, *supra*; *Logan v. McAllister*, 2 Del. Ch. 176; *Bank of U. S. v. Dandridge*, 12 Wheat. 64; *Same v. Lyman*, 1 Blatchf. 297; 20 Vt. 666; *Bangor, etc., R.R. Co. v. Smith*, 47 Me. 34; *McKay v. Beard*, 20 S. C. 156. See *Perkins v. Saunders*,

56 Miss. 733; *Atlanta v. Gate City Gaslight Co.*, 71 Ga. 106; *State v. Sibley*, 25 Minn. 387; *Hammond v. Strauss*, 53 Md. 1. The question whether or not the charter has been accepted is one of fact to be determined by the jury. *Ib.*

³ *Hudson v. Carman*, 41 Me. 84.

⁴ *Com. v. Cullen*, 13 Pa. St. 133.

be sufficient if signed by all the stockholders or parties in interest.¹ In Pennsylvania it has been held that before a charter can be regarded as accepted by a religious society, the members must have acted unitedly and signified their assent or dissent in their associate capacity.² An alteration of a charter may be agreed to either before or after the passage of the act, the assent of the stockholders relating back to the date of the law.³

§ 37. **Proof of acceptance.**—The acceptance of the charter, like every other controverted fact, is to be proved by the best evidence in the power of the party who relies upon it. The books of a corporation are the regular evidence of its doings. If books have not been kept, or have been lost or destroyed, or are not accessible to the party upon whom the affirmative lies, an acceptance of the charter may be proved by implication from corporate acts.⁴ Where private corporations are chartered for the benefit of individuals, the presumption is that they are chartered at the instance and on the request of the parties to be benefited thereby, and consequently accepted by them. If, therefore, they are found exercising the privileges granted, it will be almost conclusive evidence of the fact of acceptance.⁵ Where an act of incorporation was read in evidence, and it was proved that meetings were held under it, by-laws adopted, officers chosen, and other important corporate acts done, it was held sufficient to establish the fact of the existence of a corporation, although no legal record of the first meeting and acceptance of the charter could be produced.⁶ The

¹ *Davies v. Hawkins*, 3 Maule & Selw. 488; *Stow v. Wyse*, 7 Conn. 214; *Livingston v. Lynch*, 4 Johns. Ch. 573; *In re St. Mary's Church*, 6 Serg. & Rawle, 498.

² *Short v. Unangst*, 3 Watts & Serg. 45.

³ *Ehrenzeller v. Union Canal Co.*, 1 Rawle, 181.

⁴ *Hudson v. Carman*, 41 Me. 84; *Palfrey v. Paulding*, 7 La. Ann. 363; *Russell v. McLellan*, 14 Pick. 63; *Lyons v. Orange, etc.*, R.R. Co., 32 Md. 18; *Logan v. McAllister*, 2 Del. Ch. 176.

⁵ *Talladega Ins. Co. v. Landers*, 43 Ala. 115.

⁶ *Trott v. Warren*, 11 Me. 227; *Bowdoinham v. Steam Mill Corp.*, 36 Me. 78.

cases are numerous in which it has been held that the actual use of the powers and privileges given furnish, in the absence of an authenticated record of acceptance, sufficient evidence of it. A minority cannot bind the majority by acceptance. But if the members of a company have, in combination, pursued a uniform and harmonious course of conduct which is consistent with no other hypothesis than an acceptance of the charter, the strongest inference of acceptance arises.¹ It did not appear, by the records of a society, that the act of incorporation had been accepted by an express vote to that effect, nor that a notice of the first meeting was published in a newspaper as the act required. But the books showed that, at a certain time, a committee was appointed to petition the legislature for a charter ; that subsequently the society met and appointed a day on which to hold the first meeting under the act of incorporation ; that on that day a meeting was duly held and officers chosen ; that, sixteen years thereafter, the president of the society was authorized and directed to apply to the legislature to alter the corporate name of the society, which, having been done, and an act passed, the recording secretary had uniformly designated the society by the name given to it by that act. It was held that the presumptive proof, both of the acceptance of the charter and of the legal organization of the corporation, was as satisfactory as direct evidence would have been.²

Where the act of incorporation does not require a vote of acceptance, every formality may be presumed from a continual exercise of the corporate powers. This is also true of assent to a new or additional charter by an existing

¹ *Mu. Ins. Co. v. Stokes*, *supra* ; *Gordon*, 1 Pick. 297 ; *Dunn v. St. Andrew's Church*, 14 Johns. 118 ; *Bank of U. S. v. Dandridge*, 12 Wheat. 246 ; *Doe v. Woodman*, 8 East. 439.

² *Soc. of Middlesex v. Davis*, 3 Metc. 133.

corporation, which may, in like manner, be inferred from acts or omissions inconsistent with any other hypothesis. A single unequivocal act may be sufficient to establish assent; as if a suit be brought and carried on when it could only be maintained under the provisions of the amended charter.¹ "All the acts of private persons, even of the most solemn nature, may be presumed or proved by presumptive evidence; so as to the acts of a corporation, if they cannot be reasonably accounted for but on the supposition of other acts done to make them legally operative and binding, they are presumptive proofs of such other acts. Thus, as deeds and grants to private persons which are beneficial to them are presumed to have been accepted, so also may the acceptance of an act or charter of incorporation beneficial to the corporation be presumed for the like reason. And a long lapse of time, and the continued exercise of the corporate powers granted to a corporation, sufficiently justify the presumption of the acceptance of the charter. So if a particular charter is applied for and it is granted, the assent may be presumed from such previous application."² If a legislative grant enlarges the power of a corporation and increases its facilities for the transaction of business, the exercise of the power by the corporation is conclusive to show that the grant was accepted;³ and it will, of course, be the same when the additional powers are conferred by a general law applicable to all similar corporations.⁴ Where it appeared that two corporations, in the exercise of such powers, contracted with each other, and were authorized to do so at a stockholders' meeting convened for the purpose, it was held, in the absence of any averment or evidence to the contrary, sufficient ground for

¹ *Com. v. Cullen*, 13 Pa. St. 133; *Bangor, etc., R.R. Co. v. Smith*, 47 Me. 34. See *Taylor v. Commissioners of Newberne*, 2 Jones N. C. Eq. 141.

² *Soc. of Middlesex v. Davis*, *supra*, per WILDE, J.

³ *Watumpka, etc., R.R. Co. v. Bingham*, 5 Ala. 657.

⁴ *Goodin v. Evans*, 18 Ohio St. 150.

assuming that the corporations had accepted these powers as a part of their organic law, especially as no member had ever interposed any protest or objection.¹ The assent of a corporation to an amended charter will be presumed from any acts or omissions inconsistent with any other conclusion.² Where an amended charter of a bank required the assent of the stockholders by a written declaration filed with the auditor of the State, it was held that an acceptance might be presumed from the acts of those interested, although the prescribed form of acceptance was not pursued; and that such acts might constitute an estoppel conclusive upon those who participated in them.³ When a party contracts with a railroad company in the name it is authorized by its amended charter to take, he cannot afterward deny that such amended charter was legally accepted.⁴ A certificate of acceptance of an amendment is sufficient though it be not filed, the certificate being mere proof of the acceptance.⁵

The election of corporate officers in pursuance of a new, or the alteration of an old, charter is but presumptive evidence of prior acceptance.⁶ If officers of a corporation openly exercise a power which presupposes a delegated au-

¹ *Vt. & Canada R.R. Co. v. Vt. Cent. R.R. Co.*, 34 Vt. 2.

² *Hope Mu. Fire Ins. Co. v. Beckman*, 47 Mo. 93, *aff'd Same v. Koeller*, *Ibid.* 129; *Covington v. Covington Bridge Co.*, 10 Bush. 69; *Kenton County Court v. Bank Lick Turnpike Co.*, *Ibid.* 529; *Sumrall v. Sun Mut. Ins. Co.*, 40 Mo. 27.

³ *Owen v. Purdy*, 12 Ohio St. 73; *Callender v. Painsville, etc., R.R. Co.*, 11 Id. 516.

⁴ *Eppes v. Mississippi, etc., R.R. Co.*, 35 Ala. 33. In *Allen v. McKean*, 1 Sumner, 276, it was claimed that the Board of Bowdoin College had assented to an amendment of the charter because they had "acquiesced in it." It was held that

the acquiescence of the Board could not be construed into an approval of the act. An act of the legislature authorized a turnpike company to resurvey and alter their road, and permitted certain of the inhabitants to pass the gate free of toll. The company, after the act was passed, proceeded to survey the ground, but made no record of the survey, or any alteration in the road. It was held that there had been no acceptance of the amendment on the part of the company. *Pingry v. Washburn*, 1 Aiken, 264.

⁵ *Cincinnati, etc., R.R. Co. v. Cole*, 29 Ohio St. 126.

⁶ *Com. v. Cullen*, *supra*.

thority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. If a person acts notoriously as the cashier of a bank, and is recognized by the directors, or by the corporation, as an existing officer, a regular appointment will be presumed; and his acts as cashier will bind the corporation, although no written proof is or can be adduced of his appointment.¹ Where the charter of a bank provided that the cashier should execute a bond with two sureties for the faithful discharge of his duties, the bond to be approved by the directors, it was held that the vote of the directors to accept the sureties, and the fact that the bond was in the possession of the president of the bank, were sufficient proof of the acceptance of the bond by the corporation.²

§ 38. Evidence in general of corporate existence.—Acting as a corporation for any length of time not being sufficient to create a corporation, it is necessary to show a charter or law which, upon its acceptance, created a corporate body;³ or, if the law provides that a corporation may be formed upon a subsequent compliance with prescribed regulations and forms, to prove that such regulations and forms were observed. If the law exists, and the record shows a *bona fide* attempt to organize under it, slight evidence of user is sufficient. Acts to show user must be corporate acts, or such as would have been corporate acts if the attempted incorporation had been perfected.⁴ Doing the very business in the manner pointed out by the statute in the corpo-

¹ Bank of U. S. v. Dandridge, 12 Wheat. 439.

² Dedham Bank v. Chickering, 3 Pick. 355.

³ Ernst v. Bartle, 1 Johns. Cas. 319; Utley v. Union Tool Co., 11 Gray, 139. The statute of Arkansas provides that "a copy of the charter, or a record

thereof, duly certified by the Secretary of State, under the great seal of the State, shall be evidence of the creation of the corporation." Comp. Laws of Kans. of 1879, ch. 23, sec. 9. McCune Mining Co. v. Adams, 35 Kansas, 193.

⁴ Dewitt v. Hastings, 40 N. Y. Super. Ct. 463.

rate name would be direct evidence of user.¹ The production of a charter of an insurance company, and proof that the company kept an office, issued policies of insurance, had a secretary, etc., was held sufficient evidence of the existence of the corporation.² The books of a corporation containing entries of such acts as the charter prescribes, are admissible to prove the organization and existence of the corporation.³ Where certain steps are required to be taken before a corporation has an existence, such as the opening of books, subscription of the capital stock, and the choice of directors, the production of the corporate books showing the election of officers, is *prima facie* sufficient to prove that the requisites of the statute have been complied with, and that the corporation has an existence.⁴ To make the books admissible in evidence, it must, of course, be proved that they are the corporate books, that they have been kept as such, and that the entries were made by the proper officer, or by some person in his necessary absence.⁵ The plaintiff put in evidence a charter, and advertisements in two newspapers, purporting to have been signed by one of the corporators, giving notice of a meeting of the persons named in the act, to be held at a designated time and place, to pass upon the following matters: "1st. To choose a chairman and secretary of the meeting; 2d. To see if the persons named in the act will accept the same; 3d. To make choice of such officers as may be authorized by law for such corporations," etc. The plaintiff then offered in evi-

¹ Cahill v. Kalamazoo Mu. Ins. Co., 2 Dong. Mich. 124; People v. Beigler, Hill & Denio, 133; Eaton v. Aspinwall, 19 N. Y. 119; Narragansett Bank v. Atlantic Silk Co., 3 Metc. 282. "The maxim of law is, that all things shall be presumed to have been rightly and correctly done until the contrary is proved. As the corporation could not proceed lawfully until duly organized, and as they did proceed to act as a

corporation, this presumption has its effect." Ibid., per SHAW, C. J.

² Way v. Billings, 2 Mich. 397.

³ Buncombe Turnpike Co. v. McCarrson, 1 Dev. & Batt. 306; Crump v. U. S. Mining Co., 7 Gratt. 352.

⁴ Ryder v. Alton, etc., R.R. Co., 13 Ill. 516.

⁵ Highland Turnp. Co. v. McKean, 10 Johns. 154.

dence a book, and called a witness who testified that he was the acting clerk of the company, and as such had the custody of the book ; that he knew that the book was the one in which the records of the company were kept ; that he received by mail the written appointment of clerk *pro tem.*, signed by the president, which was read in the case ; that afterward he received the book of records from one of the corporators, and had since that time made entries in it for the records of the corporation as clerk of the same, and signed the entries as such ; and that he had kept the book in the company's office. The book was excluded on the ground that the existence and organization of the corporation must first be proved by evidence *aliunde*, before the corporate books could be received. Held error.¹ To establish the fact of the incorporation of a plankroad company, the proof showed that notice of the opening of the books of subscription as required by law was properly given ; that stock was subscribed to the original articles of association ; that directors were elected on due notice ; that the articles of association properly indorsed were filed in the office of the Secretary of State ; and that the company had constructed its road and put it in operation. It was held sufficient evidence of a corporation *de facto* if not *de jure*.² Where it is shown that a charter has been granted, those in possession and actually in the exercise of corporate rights will be considered as rightfully there against wrong-doers and persons who have treated or acted with them in their corporate character. In a suit in which the plaintiffs claimed to be a body corporate, it appeared that a charter was granted for an academy, and that immediately thereafter the institution was organized and conducted as a corporation. The defendant proved that all but one of the original ten corporators had either died or gone away, and he urged that the

¹ Hudson v. Carman, 41 Me. 84.

² Eastern Plank Road Co. v. Vaughan, 20 Barb. 155.

plaintiffs could not recover because a continuance of the corporation had not been shown; that the places of the original nine trustees should be proved to have been regularly filled according to the provisions of the charter; and that it was not sufficient to show that persons calling themselves trustees acted as such. This objection was overruled and judgment for the plaintiffs affirmed on appeal.¹ Even where it is shown that the charter has been granted upon a precedent condition, if persons are found in the quiet possession and exercise of the corporate rights as against all but the sovereign, the precedent condition will be taken to have been performed.² In Massachusetts, by the statute³ allowing corporations for certain purposes to be organized without a special act of the legislature, it is required that before the corporation commences business certificates of its officers setting forth the corporate name and other particulars shall be deposited by them with the Secretary of State and published and recorded. In a suit

¹ Elizabeth City Academy v. Lindsey, 6 Ired. 476.

² Tar River Nav. Co. v. Neal, 3 Hawks, 520; Duke v. Cahawba Nav. Co., 10 Ala. 82; Grand Gulf Bank v. Archer, 8 Smed. & Marsh, 151; Thompson v. N. Y. R.R. Co., 3 Sandf. 625; Meth. Epis. Church v. Pickett, 19 N. Y. 482; Mitchell v. Deeds, 49 Ill. 416, and cases cited. Although a user of franchises raises a presumption in a collateral proceeding that the corporation is in the rightful exercise of such power, yet in proceedings by *scire facias* or *quo warranto* to terminate the existence of a body on the ground that it has usurped its franchises, it is bound to show a sufficient grant to authorize its organization, and also that it has conformed to all of the material requirements imposed by its charter, or if not, that its organization has been properly legalized. Mitchell

v. Deeds, *supra*. Where an attempt was made to organize a corporation under the general incorporation law of a State, a name selected, trustees appointed, a president and other officers elected, and the trustees had the general management of the property for years, leased and mortgaged it, and expended a large amount of money, it was held that there was a corporate body *de facto*, the regularity of whose organization could not be questioned collaterally. Thompson v. Candor, 60 Ill. 244. See Hunt v. Kansas & Mo. Bridge Co., 11 Kansas, 412.

³ Genl. Sts. of Mass., ch. 61. In Massachusetts acts of incorporation are deemed public acts, and printed copies of them published under the authority of the Government are admitted in evidence. Rev. Sts. of Mass., ch. 2, sec. 3; ch. 94, sec. 58.

against a corporation by a creditor, it having been proved that all the acts of the corporation preceding the certificates were regular and legal, it was held no defense that the certificates were not signed, published, or recorded.¹ Parties signed and acknowledged articles of incorporation stating the object, name, duration, amount of capital stock, place of business, and the number of trustees, and named those who were to act for the first three months. By mistake, the articles were filed with the wrong officer. The association took possession of the property and did the business named in the articles. It was held that the question of the due incorporation of the association or its right to exercise corporate powers could not be inquired into in an action brought by the association.² It should be

¹ *Merrick v. Reynold Co.*, 101 Mass. 381.

² *Bakersfield Town Hall Assoc. v. Chester*, 55 Cal. 98. Where a corporation has gone into operation, and rights have been acquired under it, every presumption should be made in favor of the legality of its existence. *Hagerstown v. Creeger*, 5 Har. & Johns. 122; *Busey v. Hooper*, 35 Md. 15. In *Bank of Toledo v. The International Bank*, 21 N. Y. 542, the question was whether the plaintiff sufficiently proved itself to be a corporation under the laws of Ohio. The statute of that State authorized individuals to associate and form banking companies by signing and acknowledging a certificate, and causing it to be recorded in the office of the recorder of the county. The act further provided for an examination of the institutions which had recorded certificates by the bank commissioners, or by a special agent appointed by them, to ascertain whether or not they had complied with the act; and the commissioners were to certify to the Governor as to such as were approved of, and he, if satisfied

that the law had been complied with, was to issue his proclamation setting forth that they were authorized to commence and carry on the business of banking. The plaintiff proved that a certificate containing the requisites mentioned in the act had been recorded in the proper county, and that the institution had been doing business as a bank under its articles of association for several years, and that the defendant during that time had acted as its collecting agent, corresponding with it under the corporate name. It was held that the proof was sufficient. See *Eaton v. Aspinwall*, 19 N. Y. 119; *Meth. Epis. Church v. Pickett*, *Ib.* 482. In a suit between a corporation and an individual the question of fraud in obtaining the charter cannot be inquired into, whether the corporate functions are consummated by an act of the legislature, or there is some condition precedent which the Governor or some other officer must certify has been performed. Such an inquiry can only be made at the instance of the public. *Duke v. Cahawba Nav. Co.*, 16 Ala. 372. In *Centre, etc., Turnpike Co. v.*

observed, however, that the general rule that the existence of a corporation may be proved by producing the charter and showing acts of user under it, has no application to a corporation formed under the provisions of a general

McCanaby, 16 Serg. & Rawle, 140, which was an action against a subscriber, it appeared that an act of the legislature provided that when six hundred shares had been subscribed, the commissioners should certify that fact to the Governor, who should incorporate the subscribers. The certificate was made and the charter granted; whereupon the State subscribed twenty thousand dollars. The defense was that the charter was obtained by means of the subscription of three hundred shares of fictitious stock to make up the number of subscribers required by law. The court said: "If this charter was deceptively obtained, obtained by false representations, it could not in a collateral action, in an action brought by the company to compel the performance of contracts entered into with it, be declared void. But if this had been fraudulently obtained, on which I am not called upon to give any opinion, still, until that question had been directly decided in a proceeding instituted in this court, which alone has jurisdiction, by *scire facias*, to repeal the charter or declare it forfeited, or by writ of *quo warranto* at the suit of the State, in which the State must be a party, and a party to the judgment for the seizure of the franchise, there is no instance of calling in question the right of a corporation for the purpose of declaring its charter void, but at the instance and on behalf of the government, and never on the relation of any individual." And see *State v. Carr*, 5 N. H. 371; *Tar River Nav. Co. v. Neil*, 3 Hawks, 520; *Chas. River Bridge v. Warren Bridge*, 7 Pick. 344. But when the

organization is effected by members associating themselves under a general law authorizing them thus to associate, the charter is the mere ministerial ratification of their act founded on the assumption that the actual organization has been conducted according to law. Such a charter is no cover of fraud in procuring it, and creditors may show fraud in order to set aside the immunity which a charter fairly obtained is intended to furnish. *Paterson v. Arnold*, 45 Pa. St. 410. When a private corporation is charged with interests of a public nature, its charter may thereby be rendered a public act. *State v. Vincennes University*, 5 Ind. 77; otherwise the court will not take judicial notice of its charter. *City Council v. Montgomery, etc.*, Plank R. Co., 31 Ala. 76. The charter of a bank which reserves a certain number of shares of the capital stock for the use and benefit of the State, to be subscribed for in such manner as the legislature may direct, and provides that any director, officer, or other person holding any share who shall commit any fraud or embezzlement touching the money or property of the bank, shall be liable to prosecution by indictment in the name of the State, is a public law to be taken notice of judicially. *Townson v. Havre de Grace Bank*, 6 Har. & Johns. 47. When an act of incorporation is a public act, a subsequent act enlarging the powers of the corporation must necessarily be a public act of which every person must be deemed to have taken notice. *Bank of Utica v. Magher*, 18 Johns. 341; *Stephens, etc., Transportation Co. v. Central R.R. Co.*, 33 N. J. 229.

statute requiring certain acts to be performed before the corporation can be considered *in esse*, or its transactions possess any validity. The existence of a corporation thus formed must be proved by showing at least a substantial compliance with the requirements of the statute. "But there is a broad and obvious distinction between such acts as are declared to be necessary steps in the process of incorporation and such as are required of the individuals seeking to become incorporated, but which are not made prerequisites to the assumption of corporate powers. In respect to the former, any material omission will be fatal to the existence of the corporation, and may be taken advantage of collaterally in any form in which the act of incorporation can properly be called in question. In respect to the latter, the corporation is responsible to the Government in a proceeding to forfeit the charter."¹

§ 39. **Corporations by prescription.**—A corporation by prescription is one which has existed from time immemorial and of which it is impossible to show the commencement by any particular charter or act, the law presuming that such charter or act once existed, but that it has been lost by such accidents as length of time may produce.² A question arose whether between the 5th of Richard II. and the year 1441, Kingston-upon-Hull had a charter from the king creating and giving certain port duties to the corporation. For three hundred and fifty years subsequent to the year 1441, the duties had been exacted and submitted to. Lord Mansfield said that he had taken it to be established in point of law that though the record be not produced, nor any proof given of its being lost, yet under certain circumstances it may be left to the jury whether

¹ *Mokelumne Hill Mining Co. v. Woodbury*, 14 Cal. 424. In an action by a corporation, a witness may be called to testify that the plaintiff is a corporate body, regularly organized,

and exercising the franchises and powers granted by its charter. *Wilmington & Manchester R.R. Co. v. Saunders*, 3 Jones N. C. 126.

² 1 Kyd on Corp. 41; 1 Blk. Com. 473.

there is not sufficient ground to presume a charter.¹ In this country a municipal or *quasi* corporation may exist by prescription which presupposes an authorized and legitimate creation.² The defendants, who were assessors of the North Parish in Harwich, proved by a resolve of the General Court and by a certificate of the Secretary of State, that no act of incorporation could be found. They then showed the establishment of a separate parish in Harwich in 1746, and, by the records since kept of their meetings and proceedings, that the parish had taken successively and at different periods the names of "The First Precinct in Harwich," "The Precinct," "The Parish," "The North Parish," and "The North Parish lying in Harwich and Brewster"; and also that a certain boundary line had existed for over forty years between the north and south parishes, and had been observed as such. The Supreme Court held that as no act of incorporation could be found, proof of a parish by reputation was proper.³ When no charter or act of incorporation of a town can be found, it may be proved to be a town by reputation, or it may be shown to have claimed and exercised the powers of a town with the knowledge and assent of the legislature, and without objection or interruption for so long a period as to furnish evidence of prescriptive right. A subsequent act of incorporation does not raise a conclusive presumption that the town was not previously incorporated, but is evidence to be weighed by the jury.⁴ In Massachusetts a region was organized as a district, and for thirty years exercised the powers and privileges of a town, sent representatives, was assessed for all taxes, and in many acts and pro-

¹ Mayor of Kingston v. Horner, Cowp. 102.

² Charles River Bridge v. Warren Bridge, 7 Pick. 344; Robie v. Sedgwick, 35 Barb. 319; Londonderry v. Andover, 28 Vt. 416; White v. State, 69 Ind. 273.

³ Dillingham v. Snow, 5 Mass. 547.

⁴ New Boston v. Dunbarton, 12 N. H. 401; 15 Id. 201; Bow v. Allentown, 34 Id. 351. See Jameson v. People, 16 Ill. 257; People v. Maynard, 15 Mich. 463.

ceedings was recognized by the legislature as a town ; but no charter could be found. A witness testified that he removed there several years previous to its presumed incorporation ; that he remembered talking with the governor of the province relative to the incorporation, and that he believed he obtained an act for that purpose, and carried the same home with him, although he had no particular recollection of that fact. It was held sufficient proof of incorporation.¹ In the same State, there being no evidence of any geographical laying out or defining of the limits of school districts in T., proof was offered that in point of fact there was a school district number one in T., that this district had certain limits, and that it had so existed for many years. It was held unnecessary to produce a record of the laying out of the district, or any direct and positive evidence of such laying out ; proof of the fact that such a district had long been known and acted as such being sufficient.² In Vermont it was held well settled that the mere fact that a school district has maintained its existence and operation a number of years, say fifteen, is sufficient proof of its regular organization.³ In New York, in an action by the trustees of a school district, no record of the original organization of the district could be found. It was proved that the original powers pertaining to ordinary school districts in the several towns of the State had been exercised by trustees in the same locality ever since 1819. School meetings had been held, trustees chosen, a school kept, and school-houses built in the ordinary manner. It was held that there was sufficient to raise the presumption that the district was duly organized at an early day after such organizations were authorized by the revised laws of 1813 ; that consequently the district had all the powers belonging to

¹ Stockbridge v. West Stockbridge,
12 Mass. 399.

² Bassett v. Porter, 4 Cush. 487.

³ Sherwin v. Bugbee, 16 Vt. 439.
See Barnes v. Barnes, 6 Id. 388.

corporations of that character, and was capable of owning and holding real estate suitable to the purposes and objects of its creation.¹

§ 40. **Corporations by necessary implication.**—When rights, privileges, and powers are granted by law to a body of persons by a collective name, and there is no mode by which such rights can be enjoyed or powers exercised except by their acting in a corporate capacity, such bodies are deemed by necessary implication to be so far corporations as to enable them to exercise and enjoy the rights and powers thus granted.² This was held to be the case where a statute simply declared that a bank designated by name should be established. There were no express words incorporating any particular persons; but the fund was placed under the management of a given number of directors, and the usual powers of banking conferred upon them.³ So, where it was provided that several persons named and their heirs, the resident burgesses for the time being, and all persons who should at any time thereafter be burgesses and their heirs, should be trustees for inclosing, improving, and dividing a certain marsh, it was held that they necessarily became a corporation, though not expressly made so by the act.⁴ A long-continued exercise of authority, bearing on its face the impress of corporate acts, such as individuals cannot, and a corporation alone is competent, to perform, affords presumptive evidence of a grant or charter.⁵ The defendant, an alleged corporation, having denied that it was duly organized and liable to be sued on its promissory notes, the plaintiff gave the defendant's attorney notice to produce the corporate books containing the record of the organization, which not being done, he offered to prove corporate

¹ Robie v. Sedgwick, *supra*.

Ark. 620; Murphy v. State Bank, 7 Id.

² Stebbins v. Jennings, 10 Pick. 172. (2 Eng.) 57.

⁴ Newport Marsh Trustees, *ex parte*,

³ Mahony v. Bank of the State, 4 16 Sim. 346.

⁵ Greene v. Dennis, 6 Conn. 293.

acts, and copies of certificates in the form required by the statute authorizing the formation of corporations in certain cases by voluntary associations. It was held that this evidence was competent.¹ That a town was duly organized before a specified time, may be presumed from the fact that at that time town officers had been appointed and were discharging the powers and duties belonging to officers of towns.² Where a church had been a body corporate *de facto*, holding and enjoying property as such for the previous four years, it was held that it would be presumed that every formal requisite to the due creation of the corporation had been complied with.³ A grant of the power to perform corporate acts implies a grant of corporate powers.⁴ By an act for making and keeping the river Tone navigable, it was provided that thirty persons therein named and their successors should be conservators of the river during their lives unless removed, and that when by death or removal they were reduced in number to twenty, the survivors should choose other persons to make up the original number. They were empowered, in the name of conservators of the river Tone, to receive any gift, legacy, or grant of goods, chattels, money, or land, in fee, or for any other estate or term, "for the uses aforesaid"; and it was made lawful for any persons to convey any estate to the conservators and their successors. It was held that although they were not created a corporation by express words, they were so by implication, and that they were entitled to sue in their corporate name for an injury done to their real

¹ Dooley v. Cheshire Glass Co., 15 Gray, 494.

² Londonderry v. Andover, 28 Vt. 416. See New Boston v. Dunbarton, 15 N. H. 201.

³ All Saints' Church v. Lovett, 1 Hall, 191. In Michigan, a religious society which has exercised the franchises and privileges of a corporation

for the term of ten successive years, must be presumed to have been legally incorporated. How. Sts. of 1869, sec. 4649; Trustees of First Cong. Church v. Webber, 54 Mich. 571.

⁴ Com. v. Westchester R.R. Co., 3 Grant's Cas. 200; Dean v. Davis, 51 Cal. 406.

property.¹ A statute of Connecticut provided that any number of persons not less than three, who by articles of agreement in writing should associate according to the statute, and comply with all the provisions of the same, should become a body politic and corporate. One of the requirements of the statute was that before the corporation thus formed commenced business, the president and directors should cause the articles of association to be published. It was held that there might be a corporation for all the purposes of maintaining an action without publication; general reputation that the plaintiffs were conducting business as a corporation being sufficient.² Where there is evidence showing the incorporation and organization of a company, a continued user of its franchises by persons in their actual possession, who assume to act as its directors and officers, have control of its records, and carry on its business, it is competent to show continued corporate existence, and that the persons claiming to be and acting as directors are such lawfully.³

§ 41. **Admissions and declarations.**—A person who has entered into a contract with a corporation in its corporate name, thereby admits it to be a duly constituted body politic and corporate under that name.⁴ The general rule is, that a person dealing with a company which is in the user of corporate franchises, cannot set up that it has no corporate existence, either in consequence of acts which would cause a forfeiture of its charter, or of the omission of acts which should have been performed before it could acquire a title as against the State.⁵ One who borrows money from a

¹ *Conservators of River Tone v. Ash*, 10 Barn. & C. 349.

² *Holmes v. Gilliland*, 41 Barb. 568.

³ *St. Paul Fire and Marine Ins. Co. v. Allis*, 24 Minn. 75.

⁴ *Dutchess Cotton Manf. v. Davis*, 14 Johns. 238; *Jones v. Bank of Tennessee*, 8 B. Mon. 122; *Mitchell v.*

Deeds, 49 Ill. 46; *Worcester Medical Inst. v. Harding*, 11 Cush. 285; *Henriques v. Dutch West India Co.*, 2 Ld. Raym. 1535; *All Saints' Church v. Lovett*, 1 Hall, 191; *Tar River Nav. Co. v. Neal*, 3 Hawks, 520.

⁵ *Abbott v. Aspinwall*, 26 Barb. 202; *Cowell v. Colorado Springs Co.*, 3

corporation, and gives back a mortgage as security, is estopped from denying the existence of the corporation.¹ Where, in a suit by the receivers of a bank, the defense was that the bank had no legal existence for the reason that a majority of the commissioners named in the charter did not attend to open the books for subscription to the capital stock, and that a commissioner was not appointed by the Governor, as the charter required, to examine into the condition of the bank and report thereon to him who was to issue his proclamation that the law had been complied with, it was held that as the defendant had admitted the existence of the bank by receiving its funds, and transacting business with it as a corporation, he could not deny that it had acquired rights as such.² A bank which in its long transaction of business with another bank has recognized the incorporation of the latter, cannot, after receiving assets of such other bank as a preferred creditor, which preference was unlawful for an incorporated bank to make, set up as a defense to an action by a receiver to recover back these assets, that the bank was not duly incorporated.³ Where a certificate of incorporation has been executed under a general law authorizing the formation of corporations in that manner, and there has been a user of corporate powers

Col., 82; *Meth. Epis. Church v. Pickett*, 19 N. Y. 482. In *Trustees of Vernon Soc. v. Hills*, 6 Cowen, 23, which was an action brought by the trustees of a religious corporation, *SAVAGE*, Ch. J., said: "The plaintiffs have acted as trustees upon the matter in question, and in bringing their suit *colore officii*; and before an objection to their right can be sustained by the defendant on the ground that they were not regularly elected, he must show that proceedings have been instituted against them by the government, and carried on to a judgment of ouster." In *Brouwer v. Appleby*, 1 Sandf. 158, where the de-

fense to an action on a promissory note was that the corporation was never duly organized, *OAKLEY*, C. J., said: "The defendant as a contracting party with this corporation cannot object to the want of the requisite organization, and any defect in that respect, if valid, is only available in behalf of the sovereign power of the State." See *Eaton v. Aspinwall*, 19 N. Y. 119.

¹ *People's Savings Bank v. Collins*, 27 Conn. 142.

² *Bank of Circleville v. Renick*, 15 Ohio, 322.

³ *Rafferty v. Bank of Jersey City*, 33 N. J. 368.

under color of the certificate, and the party setting up the want of corporate existence has recognized the corporation by transacting business with it as such, the proof is *prima facie* sufficient.¹ Subscribers may be estopped by their acts from saying that a corporation has not been legally established.² But a subscription to the preliminary articles of association not purporting to be with an existing corporation will not have that effect.³ Where, however, in an action upon a subscription to the capital stock of a company, it is agreed that "fifty per cent. of the defendants' subscription to the capital stock of the company has been paid, and that the assessment and calls for the balance in five instalments of ten per cent. each have been duly and legally made in accordance with the by-laws of the company and the laws of the State, the last of which assessments was made more than a year previous, the defendant duly notified of the same, and a demand made upon him by the proper authority that he pay the assessments, which he promised to do, but has not done, it is an admission of the organization of the corporation."⁴

Filing an information against a corporation in its corporate name is an admission of the existence of the corporation, or that it once had a legal existence.⁵ But the recognition by the plaintiff in a suit that the defendants are members of a company designated and known by a certain name, and administered as a company, does not preclude them from showing that the company has no legal corporate existence. In order to estop the plaintiffs there should be an admission that the company is entitled to exercise corporate rights and privileges.⁶ A stockholder who has

¹ Leonardsville Bank v. Willard, 25 N. Y. 574.

² Cabot, etc., Bridge Co. v. Chapin, 6 Cush. 50; New Hamp. Cent. R.R. Co. v. Johnson, 30 N. H. 390.

³ Indianapolis Furnace, etc., Co. v. Herkimer, 46 Ind. 142; Rikoff v. 153.

Brown's Rotary Shuttle Sewing Machine Co., 68 Id. 388.

⁴ Ibid.

⁵ People v. Saratoga & Rensselaer R.R. Co., 15 Wend. 113.

⁶ Field v. Cooks, 16 La. Ann.

dealt with the corporation, when sued on his subscription, cannot deny the validity of the proceeding by which the name of the corporation was changed, although the old name was recognized by the subscription.¹ The existence of a corporation and its capacity to sue are admitted by a plea to the merits.² So a person who has obtained a judgment against a company as a corporation, is afterward estopped from denying its corporate capacity, it being an admission by him of the existence of the corporation which has been acted on by the court.³

The doctrine that a recognition of corporate existence by dealing with the corporation, will estop from questioning it, rests on the ground that such recognition creates relations and encourages conduct which there may be difficulty in undoing. The rule is not applicable when no new rights have intervened, and such recognition has itself been brought about by fraudulent dealings carried on by the company for the purpose of entrapping a party into the act on which such recognition depends.⁴

After a company has exercised the franchises conferred by its charter, it will not be permitted to deny the validity of contracts entered into by the *de facto* officers.⁵ In Massachusetts it was held that a corporation organized under the joint stock act of 1851 was estopped to set up, in defense to an action, the falseness of a certificate of its organization filed by its officers in the office of the Secretary of State pursuant to the statute.⁶ A., with others, formed an association, and proclaimed themselves a corporation under the statute, taking what they supposed were necessary measures to perfect their organization according to law.

¹ Greenville, etc., R.R. Co. v. Johnson, 8 Baxter, Tenn. 332.

² West Winsted Savings Bank, etc., v. Ford, 27 Conn. 282.

³ Pochelu v. Kemper, 14 La. Ann. 308; Schaeffer v. Missouri Home Ins. Co., 46 Mo. 248.

⁴ Doyle v. Mizner, 42 Mich. 332.

⁵ Heath v. Silverthorn Lead, etc., Co., 39 Wis. 146.

⁶ Dooley v. Cheshire Glass Co., 15 Gray, 494.

A. influenced persons to become members of the company, and to form contracts with it as duly incorporated. During this time the company, with the concurrence and co-operation of A., did business as a corporation, admitting new members, choosing officers and agents, borrowing and loaning money, receiving money on deposit, and the like. It was held that A. was estopped from denying the existence of the corporation.¹

Although a company has not created any shares of stock, or organized in any way, or the members paid into the corporate fund the capital required by law, yet if it pretends to be incorporated it will be estopped to deny the existence of the corporation as to those who deal with it on the faith of such representations.² On the other hand, a denial by a company that it is incorporated may prevent its afterward claiming the contrary. Where, upon an information filed against the owners of a toll-bridge, alleging among other things that they were exercising the franchise of being a body politic and corporate having usurped the same, and calling on them to show by what warrant they claimed to use and exercise such franchise, they averred in their plea that they never used the franchise of a corporation, whereupon judgment of preclusion was entered, it was held that they were thereby prevented from claiming that they were a body corporate.³

§ 42. **Legislative recognition of corporation.**—When the existence of a corporation has been recognized by acts of the legislature, all inquiry into the original creation of the corporation is precluded.⁴ It becomes by such recognition

¹ West Winsted Savings Bank, etc., v. Ford, *supra*.

² Atty. Genl. v. Simonton, 78 N. C. 57.

³ Thompson v. N. Y. & Harlem R.R. Co., 3 Sandf. Ch. 625.

⁴ Soc. for the Propagation of the Gospel v. Pawlet, 4 Pet. 480; White Water,

etc., Canal Co. v. Valette, 21 How. 414; Kanawha Coal Co. v. Kanawha & Ohio Coal Co., 7 Blatchf. 391; McIntyre Poor School v. Zanesville Canal, etc., Co., 9 Ohio, 203; Williams v. Union Bank, 2 Humph. 339; Jameson v. The People, 16 Ill. 257; People v.

ipso facto a legal corporation, and any defect or irregularity in the proceedings required by law to be taken for its organization will be deemed to have been waived ;¹ the legislature having the same power to confirm and validate an irregularly organized corporate body that it has to bring into existence a new one.² The Farmers' and Mechanics' Bank of Indiana, at the commencement of the State government, was recognized by the constitution as a corporation under the charter granted to the bank by the territorial legislature.³ In the same State, in 1838, a statute recognized a territorial act passed in 1806 incorporating a board of trustees of the Vincennes University.⁴ Of course an act of the legislature recognizing a company as a corporation will not constitute it such, if the constitution forbids the creation of corporations except under general laws.⁵ The validity of a corporation proceeding under color of law, and recognized by the sovereign power, cannot be called in question collaterally, although the act recognizing the corporation is unconstitutional. The objection must be made by *quo warranto*.⁶ Defects in a charter may be cured by an act recognizing the company as a corporation, notwithstanding the rule that statutes are not to be construed so as to give them a retrospective operation.⁷ An act amending a charter is a legislative recognition of the validity of the existing corporation, and cures a defect, if any such existed, of combining two kinds of corporations

Farnham, 35 Id. 562 ; Cowell v. Colorado Springs Co., 3 Col. 82 ; Matter of N. Y. Elevated R.R. Co., 70 N. Y. 338.

¹ Black River & Utica R.R. Co. v. Barnard, 31 Barb. 258 ; Basshor v. Dressel, 34 Md. 503 ; Atlantic & Pacific R.R. Co. v. St. Louis, 66 Mo. 228. After repeated legislative recognitions of a corporation, a collateral impeachment, based upon facts touching its internal organization, cannot be sus-

tained. Turnpike Co. v. Davidson Co., 3 Tenn. Ch. 396.

² Mitchell v. Deeds, 49 Ill. 416.

³ Vance v. Farmers' & Mechanics' Bank, 1 Blackf. 80.

⁴ Vincennes University v. State, 14 How. 268.

⁵ Oroville, etc., R.R. Co. v. Supervisors of Plumas Co., 37 Cal. 354.

⁶ Commrs. v. Shields, 62 Mo. 247.

⁷ St. Louis R.R. Co. v. Northwestern, etc., R.R. Co., 2 Mo. App. 69.

in one charter, the corporation upon accepting the amendment becoming valid *ab initio*.¹ A statute of Illinois provided that all of the acts and proceedings for the purpose of incorporating the town of C. should be legal and valid, and that all ordinances passed by the president and trustees of the town, not inconsistent with the constitution of the State or of the United States, should also be legal and binding. The statute further authorized the president and trustees to fix the boundaries of the town so as to include any land laid out in town lots. It was held that the statute fully recognized the previous organization of the corporation, and cured all defects.² Where an act regulated the rate of speed of railroad trains passing through a city, it was held a legislative recognition of the existence of the company, and of its right to construct a railroad within the city.³ The consolidation of two railroad companies, so as to form a single corporation, may be legally effected by an act of the legislature recognizing the existing consolidated corporation.⁴ An act authorizing the purchase of property from a corporation thereby recognizes the existence of the corporation.⁵

§ 43. **Date of incorporation.**—When a corporation is organized under a general law, its life dates from its organization, and not from the time it begins to do business.⁶

¹ *Basshor v. Dressel*, *supra*. A statute enacted that the certificate of incorporation should contain, among other things, the number of trustees and their names, who should manage the concerns of the company for the first year. The certificate omitted such statement. It was held that the foregoing provision might be regarded as directory, especially as the company had been recognized by the court as a duly constituted corporation under the statute, had claimed to be and acted as such, and the defendant had recog-

nized its corporate existence by becoming the owner of a portion of its stock, and continuing to hold it until the company was dissolved. *Mead v. Keeler*, 24 Barb. 20.

² *Toledo R.R. Co. v. Chenoa*, 43 Ill. 209.

³ *McAuley v. Columbus, etc., R.R. Co.*, 83 Ill. 348.

⁴ *Mead v. N. Y., Housatonic & Northern R.R. Co.*, 45 Conn. 199.

⁵ *McIntyre Poor School v. Zanesville Canal & Manuf. Co.*, 9 Ohio, 203.

⁶ *Hanna v. International Petroleum*

Articles of association were drawn up and signed by a number of persons for the purpose of organizing under the act of New York of 1838 authorizing the business of banking, each taking the number of shares of stock set opposite his name. A president and directors were elected in July, 1838, but the certificate was not signed by the stockholders as required by law. Afterward, during the same month, C. subscribed the articles for twenty shares of stock, and he and his wife gave their bond and mortgage for his subscription payable to the president of the bank in accordance with the articles of association permitting payment for stock to be made in that way. In the subsequent September stockholders owning a large amount of the capital signed and sealed a certificate which conformed to the provisions of the act. C. did not sign this certificate, but he paid interest on his bond and mortgage at the end of each six months to January, 1841. It was held that as the bank when the mortgage was given had not been organized under the statute, it did not exist as a corporation, but that the payment of interest by C. was a recognition of the bond and mortgage in the hands of the president of the bank, and a redelivery of them by C. after the bank became a legal corporation might be inferred.¹ As already stated,² an act incorporating certain persons who have applied for a charter, and their associates, may constitute the persons named a corporation without further action on their part, either in the admission of associates, the choice of officers, or the division of the capital stock. By the statute of Massachusetts³ three or more persons who shall have associated themselves by articles of agreement in writing for the purpose of carrying on specified kinds of business, and shall have complied with the provi-

Co., 23 Ohio St. 622. See Chicago, etc., Co. v. Putnam, 12 Pacific Reporter, 593.

¹ *Valk v. Crandall*, 1 Sandf. Ch. 179.

² *Ante*, sec. 34.

³ Genl. Sts., ch. 61, sec. 1.

sions of the act, become a corporation. The intent is "that a corporation shall exist at least as soon as the first meeting has been held and officers elected, if not immediately upon the signing of the fundamental articles of association by which the intention of the associates to avail themselves of the privileges conferred by the legislature is manifested, and the name of the corporation determined, the amount of capital stock fixed, and the place in which and the purpose for which the corporation is established, are specified."¹ It was objected to the validity of a deed to a corporation that it contained a grant of a freehold estate in land upon certain conditions; that as the company at the time of the execution of the deed was not organized, and therefore not in being for the purpose of accepting the grant upon the terms mentioned in it, the deed could not have any immediate operation for want of the assent of the grantee; and that the deed could not have any future operation so as to pass the title to land, because it would violate the rule of law that a freehold estate cannot be created by a deed to commence *in futuro*. It was held that the subscribers for stock whose names were presented to the Governor as such, became incorporated immediately upon the execution of the letters patent by him, although their organization was not complete until the officers were appointed, and that therefore the grant contained in the deed was effectual.² If the charter provides that such persons as shall thereafter become stockholders of the company are constituted a body corporate, the corporation in the eye of the law is regarded *in esse* before it has the right to organize, so far at least as the validity of contracts in favor of the corporation is concerned. It is the statute which creates the subscribers to the stock a corporation, and not their organizing under it. Each subscriber

¹ Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385, per GRAY, J.

² Rathbone v. Tioga Navigation Co., 2 Watts & Serg. 74.

for stock *per se* becomes a member of the corporation, and all as fast as they subscribe become corporators under the provisions of the act.¹ Where a general law provides that all public statutes shall take effect in thirty days from the recess of the legislature passing the same, unless it should otherwise be ordered in the act, the words "be, and the same hereby is incorporated" in a charter do not afford any indication of an intention that the act shall take effect immediately.²

¹ Vt. Centr. R.R. Co. v. Claves, 21 Vt. 30.

² Graham v. Springfield, 21 Me. 58.

CHAPTER IV.

MEMBERS AND OFFICERS—HOW CONSTITUTED.

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| § 44. General rule as to admission of members. | § 51. Voting by proxy. |
| 45. Membership in joint stock companies. | 52. Special qualifications of voters. |
| 46. Subscribing for stock. | 53. Number of votes allowed to each share. |
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| 48. Proof of membership. | 55. Keeping polls open. |
| 49. Time and mode of electing members and officers. | 56. Proof of result of election. |
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§ 44. General rule as to admission of members.—In admitting members, regard must be had to the language of the act of incorporation, and when the charter or act is silent on the subject, to the common law, and to the nature and object of the corporation.¹ Authority to prescribe the mode of admitting members implies the power to determine whether or not they shall be admitted. Where a party having a clear presumptive right, applies to be admitted a member of an incorporated society, the application should not be denied unless the right of immediate expulsion be plain and unquestioned.² At common law, as a married woman cannot make a binding contract, she cannot, in general, become a corporator; and the same is true of an infant, who can at his election disaffirm his contract upon coming of age. But a married woman may be a share-

¹ Spaulding v. Cary, 23 Pick. 71; ² People v. Medical Soc., 32 N. Y. Aurora v. West, 9 Ind. 74; Diligent 187.
Fire Ins. Co. v. Com., 75 Pa. St. 29.

holder in respect to her separate estate.¹ So, an infant may, by devolution or devise, become a member of a joint stock company.² When a person is insured by a mutual insurance corporation, he thereby becomes a member.³

If the number of members is limited by the charter, a vacancy is usually filled by a vote of the corporation. Of course no person can be made or become a member of a private corporation without his consent.⁴ Where an act constituting the members of several mutual insurance companies a new corporation, provided that the act should not affect the legal rights of any person, and take effect "when accepted by the members of said corporations," it was held that a person who belonged to one of the original companies did not become a member of the new corporation, unless he expressly assented to it, although expressly assented to by a majority of the members of each of the old companies.⁵

Members of a religious society may be admitted by a vote of the parish; or power to admit them may be delegated by proper by-laws to a committee, or to certain officers of the society;⁶ or a person may become a member of such a society by regular attendance on its worship, and contributing to its support.⁷ Where, by an act of incorporation, certain persons "with their families" were constitu-

¹ Mathewman's Case, L. R. 3, Eq. 781; Howard v. Bank of England, 19 Id. 295; Matter of Richardson, Ib. 588; Pugh & Sharman's Case, L. R. 13, Eq. 566; Roman v. Fry, 5 J. J. Marsh. 634; Matter of the Reciprocity Bank, 22 N. Y. 9.

² Leeds, etc., R.R. Co. v. Fearnley, 18 L. J. N. S. Exch. 330.

³ Sullivan v. Mu. Ins. Co., 2 Mass. 318; Mitchell v. Lycoming Mu. Ins. Co., 58 Pa. St. 402; Georgia, etc., Life Ins. Co. v. Gibson, 52 Ga. 640; Cummings v. Sawyer, 117 Mass. 30.

⁴ See McClelland v. Whitely, 15 Fed. Rep. 322; Southern Hotel Co. v. New-

man, 30 Mo. 118; Kansas City Hotel Co. v. Hunt, 57 Id. 126; Reed v. Richmond Street R.R. Co., 50 Ind. 342; Bucher v. Dillsburg, etc., R.R. Co., 76 Pa. St. 306; Belfast, etc., R.R. Co. v. Moore, 60 Me. 561; Ticonic Water Power, etc., Co. v. Lang, 63 Id. 480; Dutchess, etc., R.R. Co. v. Mabbett, 58 N. Y. 397.

⁵ Hamilton Mu. Ins. Co. v. Hobart, 2 Gray, 543.

⁶ First Parish in Sudbury v. Stearns, 21 Pick. 148.

⁷ Cammeyer v. United German Lutheran Churches, 2 Sandf. Ch. 208; People v. Nuthill, 31 N. Y. 550.

ted a religious society, it was held that minor sons became members of the corporation, and continued to be such after attaining full age until they changed their membership.¹

After members of a religious society withdraw from it, they do not continue members, although they are of the same religious faith and tenets with the members.² What constitutes the voluntary withdrawal of members from a religious society is a question of law, and the rejection of evidence from which the legal inference may be drawn is error.³ The following note sent to the trustees of a religious society, "We, the undersigned, hereby resign our membership in the congregation of," etc., "until another reader of the said congregation is elected," was held not a resignation, but an attempt to create a suspension of membership until the happening of the contingency named.⁴

§ 45. **Membership in joint stock companies.**—In the case of trading and joint stock companies, a vote of admission is not required; the ownership of stock, either by original subscription or conveyance, in general entitling to membership; though, as we shall presently see, the charter may create an exception to this rule. In all bridge, railroad, turnpike, banking, insurance, and manufacturing companies, and generally in corporations having a capital stock and looking to profits, membership is constituted by a transfer of shares according to the by-laws, without an election on the part of the corporation; the transferee being subrogated to the rights and assuming the liability of an original subscriber.⁵ "A railway act invariably empowers the company

¹ Bradford v. Cary, 5 Me. 339.

² Den v. Bolton, 12 N. J. (7 Halst.) 206. See Groesbeck v. Dunscomb, 41 How. Pr. 302.

³ Perry v. Tupper, 74 N. C. 722.

⁴ Marks v. Cong. Daruch Amuno, 5 Daly, 8.

⁵ Gilbert v. Manchester Manf. Co., 11 Wend. 627; Sargent v. Franklin

Ins. Co., 8 Pick. 90; Overseers of the Poor v. Sears, 22 Id. 122; Downing v. Potts, 3 Zab. 66; Gregory v. Dubois, 3 Sandf. Ch. 466; Agricultural Bank v. Burr, 24 Me. 256; State v. Ferris, 42 Conn. 560. A shareholder in a corporation sustains a threefold relation: 1st. To the corporation; 2d. To his fellow-stockholders; and, 3d. To the creditors

to raise a certain amount of capital by the mutual subscription of its members. This capital is divided into shares, which are made to vest in the subscribers, according to their respective contributions, and entitle them to a corresponding proportionate part of the profits of the undertaking. Such shares are transferable by the proprietor, and in case of his death, bankruptcy, etc., pass to his legal representative. A party can in general not otherwise become a member of such a company than by himself subscribing to the undertaking, or stepping into the place of an original subscriber."¹ But where an act incorporated certain persons by name and others who might thereafter become members, to receive money and pay the depositors such interest as the directors should agree to pay, and provided that for the security of the depositors a certain amount should be raised to be divided into shares; that annual meetings should be held for the election of directors from among the members; that the directors might provide for the admission of members; and they were required to appoint from among the members five persons as a committee of examination, to declare a dividend of profits, and to pay the same to the stockholders; it was held that the stockholders were not members, and that the original members remained such, whether or not they possessed stock.² By the deed of copartnership of a joint stock company, certain forms were to be observed by transferees of shares before they could become members of the company. A. bought shares, and did some of the things that were required to constitute him a member of the company, but left one of them undone. It was held that the observance of these forms was a duty cast on purchasers of shares for the benefit of the company, and that A.'s disregard of one of them did not enable him, as respected the company, to retire from his

of the corporation. *Upton v. Hansbrough*, 3 Biss. 417.

¹ *Walford on Railways*, 252, 253.

² *Phila. Savings Institution*, 1 *Wharton*, 461.

contract ; that from A.'s default the company might say that he was not entitled to exercise any of the rights of a member ; but that he could not avail himself of his neglect.¹

If a contract to take stock in a corporation is induced by fraud, it creates no obligation, and the injured party will be entitled to have the contract abrogated.² So, if a person is induced, without fraud, to enter into a contract of this description by a promise in behalf of the corporation, that the corporation will aid him in a specified way to pay his subscription, and the promise is not kept, his contract will not be enforced.³

§ 46. **Subscribing for stock.**—Under a charter authorizing the incorporators to open books of subscription for capital stock, the contract must be in writing, and a contract cannot be established by parol evidence if a written contract has not been made ;⁴ but mere formal irregularities will not invalidate the contract.⁵ Subscriptions having been taken on a sheet of paper which was afterward placed in the record book of the company, and the names of the subscribers and the amount subscribed by them entered in the book by commissioners appointed to open books of subscription, it was held that the subscription was sufficient.⁶ The articles of association need not have been subscribed by a person to constitute him a member. A subscription to any legal and valid instrument by which a party engages to become a member of the corporation when organized, and to

¹ Burnes v. Pennell, 2 House of Lds. Cas. 497.

² Vreeland v. N. J. Stone Co., 29 N. J. Eq. 188.

³ Burrows v. Smith, 10 N. Y. 550.

⁴ Pittsburg, etc., R.R. Co. v. Clarke, 29 Pa. St. 146 ; Same v. Gazzam, 32 Id. 340 ; Fanning v. Ins. Co., 37 Ohio St. 339 ; Vreeland v. N. J. Stone Co., 29 N. J. Eq. 188.

⁵ Ashtabula, etc., R.R. Co. v. Smith, 15 Ohio St. 328 ; Clark v. Continental

Improvement Co., 57 Ind. 135 ; Cayuga Lake R.R. Co. v. Kyle, 64 N. Y. 185 ; Nulton v. Clayton, 54 Iowa, 425 ; Boston, etc., R.R. Co. v. Wellington, 113 Mass. 79.

⁶ Woodruff v. McDonald, 33 Ark. 97. The subscription may be put in form from disconnected memoranda by a person authorized by the subscribers to act in their behalf for that purpose. Iowa, etc., R.R. Co. v. Perkins, 28 Iowa, 281.

pay a given sum which is to be a part of the capital stock, followed by an acceptance of a certificate for the stock, will make the subscriber a member. The acceptance of the stock certificate is a waiver of any informality that may have intervened short of an absolute defect of jurisdiction.¹ A stipulation that the subscribers are to pay the sums annexed to their names as they may be required by the president and directors of the corporation, is not necessary under a charter creating and defining the terms of the contract of subscription. It is sufficient for the writing to indicate an intention to become a stockholder, and the number of shares taken.² An undertaking to subscribe a certain amount of stock when the subscription books shall be opened, does not make a party a stockholder; his promise being like any other agreement to purchase a specific article where the property contracted for is retained by the vendor.³

§ 47. **Effect of subscription.**—(Signing an offer or request to become a stockholder, not accepted or assented to by the corporation, does not make one a stockholder.) So a person by the mere act of subscribing for stock for which he has paid nothing and received no certificate, cannot be regarded as a member of the corporation, especially if his subscription is conditional.⁵ When the articles in an incomplete state are circulated in order to procure subscriptions, the signing of them will not bind the signer to abide by such filling up of blanks and supplying of provisions as any one may choose to insert. In such a case the signing is preliminary in character, and can only become binding upon the signer by his assent to the completed paper. If

¹ Hamilton, etc., Plank R. Co. v. Bush. Ky. 429; Quick v. Lemon, 105 Rice, 7 Barb. 157. Ill. 578; Ontario, etc., R.R. Co. v.

² Fry v. Lexington, etc., R.R. Co., 2 Metc. Ky. 314. Curtis, 80 N. Y. 219.

³ Thrasher v. Pike County R.R. Co., 364; Sewall v. Eastern R.R. Co., 9 25 Ill. 393. See Rhey v. Ellensburg, Cush. 5.

etc., Plank R. Co., 27 Pa. St. 261; Mt. ⁵ Chase v. Sycamore, etc., R.R. Co., Sterling Coalroad Co. v. Little, 14 38 Ill. 215.

signed without any designation of directors, or of other material particulars, it must be understood that the signers are to be consulted respecting such matters. Whether the preliminary consent is given upon a separate and different paper from that which is to become the articles of association, or whether the paper signed is that which when completed is to be the actual articles of association, will make no difference.¹

A valid and binding subscription constitutes a contract between the subscriber and the corporation, and secures certain rights which the respective parties may enforce. It enables the subscriber to compel the corporation to give him the legal evidence of his being a stockholder upon his complying with the terms of his subscription; and, on the other hand, it puts it in the power of the corporation to compel him to pay for his shares, and thereby to become a shareholder in fact to that amount; neither party being permitted to escape from the obligations created by the subscription.²

Where a person subscribes to the capital stock before the incorporation of the company, his subscription may be withdrawn at any time before the incorporation is completed. But if the subscriber suffers his subscription to remain unrevoked, the contract takes effect on the day the corporation comes into existence. In such a case, there being no corporation when the party subscribed, there was at that time no consideration for his promise, nor mutuality in the contract; but by suffering his subscription to stand unrevoked until the corporation came into existence, it was the same in effect as if the subscription was then made for

¹ Troy, etc., R.R. Co. v. Tibbits, 18 Barb. 297; Same v. Warren, Ib. 310; Poughkeepsie & Salt Point R.R. Co. v. Griffin, 24 N. Y. 150; Matter of Dutchess & Columbia Co. R.R. Co., 58 Id. 397.

² Spear v. Crawford, 14 Wend. 20; Beecher v. Dillsburg, etc., R.R. Co., 76 Pa. St. 306; Marsh v. Burroughs, 1 Woods, 463; Busey v. Hooper, 35 Md. 15; Cass v. Pittsburg, etc., R.R. Co., 80 Pa. St. 31.

the first time.¹ If the contract to pay for and take stock, before the incorporation of the company, is valid, and made upon a sufficient consideration, the subscription cannot be revoked. The advantages to be derived from being a member, and the right to participate in dividends, may be a positive benefit; and where the agreement secures to the subscriber these advantages, the objection of a want of consideration cannot be maintained.² A subscription for shares of stock in a turnpike company was taken by commissioners authorized to receive it, and in the form prescribed by the act, which form contained a promise to pay the amount subscribed to the president, directors, and company. It was held that on the one side the interest of the company in selling the shares, and the public advantage to be derived from the success of the enterprise, and on the other, the expected profits to accrue from the stock, were a sufficient consideration to uphold the promise.³

A subscription for stock fraudulently and collusively made is not necessarily void. Notwithstanding the fraud

¹ *Stanton v. Wilson*, 2 Hill, 153; *Buffalo, etc., R.R. Co. v. Dudley*, 14 N. Y. 336; *Ashuelot, etc., Co. v. Hoit*, 56 N. H. 548. "In agreements of this nature, entered into before the organization is formed, or the agent constituted to receive the amounts subscribed, the difficulty is to ascertain the promisee in whose name alone suit can be brought. The promise of each subscriber to and with each other is not a contract capable of being enforced, or intended to operate literally as a contract to be enforced between each subscriber and each other who may have signed previously, or who should sign afterward, nor between each subscriber and all the others collectively as individuals. The undertaking is inchoate and incomplete as a contract until the contemplated organization is effected, or the mutual agent constituted to rep-

resent the association of individual rights in accepting and acting upon the propositions offered by the several subscriptions. When thus accepted, the promise may be construed to have legal effect according to its purpose and intent and the practical necessity of the case; to wit, as a contract with the common representative of the several associates." *Athol Music Hall Co. v. Carey*, 116 Mass. 473, per WELLS, J.

² *Lake Ontario, etc., R.R. Co. v. Mason*, 16 N. Y. 451; *Hamilton & Deansville Plank R. Co. v. Rice*, *supra*; *Stanton v. Wilson*, *supra*; *Barker v. Bucklin*, 2 Denio, 45; *Schenectady, etc., & Saratoga Plank R. Co. v. Thatcher*, 1 Kernan (11 N. Y.), 102; *Barnes v. Perine*, 12 N. Y. 18.

³ *Union Turnpike Co. v. Jenkins*, 1 Caines, 381. See *Cottage St. Church v. Kendall*, 121 Mass. 528.

or collusion, the law will hold the party bound by his subscription, and compellable to comply with all the terms and responsibilities imposed upon him thereby. These responsibilities cannot be evaded by a notice to the officers of the corporation that the subscriber does not choose to take the stock in accordance with his subscription.¹ But fraudulent representations made by an agent of a corporation inducing a subscription would vitiate the contract.²

§ 48. **Proof of membership.**—The records of a corporation determine who are its stockholders for the time being, although the stock may have been pledged.³ To prove that a person is a stockholder in a company, it is competent to show that his name was entered on the records of the corporation; that he afterward stated that he had taken shares therein; and that the treasurer of the company offered him a certificate for his shares.⁴ It is not essential to constitute one a member that he have such a certificate, though the act provide that the stock shall be divided into shares and certificates be issued to the stockholders; a certificate being the mere evidence of title which the court will compel the corporation to deliver to the person having a right to it.⁵

¹ Schaeffer v. Mo. Home Ins. Co., 46 Mo. 248.

² Hays v. Ottawa, etc., R.R. Co., 61 Ill. 422.

³ State v. Ferris, 42 Conn. 560; Evans v. Bailey, 66 Cal. 112.

⁴ N. H. Cent. R.R. Co. v. Johnson, 30 N. H. 390; Dows v. Naper, 91 Ill. 44; Minneapolis Harvester Works v. Libby, 24 Minn. 327; Wheeler v. Walker, 45 N. H. 355; Strong v. Smith, 15 Hun, 222; Com. v. Woodward, 4 Phila. 124; *In re* Election of St. Lawrence Steamboat Co., 44 N. J. 529; Turnbull v. Payson, 95 U. S. 418.

⁵ Chester Glass Co. v. Dewey, 16 Mass. 94; Agricultural Bank v. Burr, 24 Me. 256; Same v. Wilson, 1b. 273;

Buffalo & N. Y. City R.R. Co. v. Dudley, 14 N. Y. 336; Beckett v. Houston, 32 Ind. 393; Farrar v. Walker, 3 Dillon, 506; First Nat. Bank v. Gifford, 47 Iowa, 575; Hawley v. Upton, 102 U. S. 314. A subscriber to stock becomes a shareholder by virtue of the subscription and before the issuance of any certificate of stock, in the absence of a provision requiring payment as a condition of membership. Waukon & Miss. R.R. Co. v. Dwyer, 49 Iowa, 121; Coquard v. Marshall, 14 Mo. App. 80. Where a religious society, supposing that its corporate papers and record had been lost, in order to preserve its property and corporate rights, filed a new certificate of incorporation under a later act and held a

Where a statute provided that members of a certain corporation should not be liable to jury duty, and that a certificate of membership, to be only given to active members, should be evidence of the fact of membership, it was held that such a certificate was proof of the mere fact of membership, and not that the holder was an active member.¹ The owner of shares in the capital stock of a bank transferred his shares and surrendered his certificate of stock to the bank as collateral security for the payment of his note to the bank, and at the same time left with the cashier a written agreement in which it was covenanted that the shares should be held as collateral security for the payment not only of that note, but also of any other note which he might give to the bank, and that in case he did not pay any note given by him, the bank might sell the shares, and, after paying the note with the avails, hold the balance subject to his use. He had received dividends on the stock and paid interest on the note from time to time, which, however, remained unpaid. It was held that he continued to be a member of the corporation.²

§ 49. **Time and mode of electing members and officers.**—The power to elect both officers and members, and the conduct of the corporate business through the agency of such officers, pertain to the condition and nature of an aggregate corporation, and need not be expressly conferred by the charter. When this power is not lodged in other hands, it must be exercised by the corporation itself. It may, however, be taken from the corporation at large and be reposed in a board of directors.³ If the time and manner of

new election for trustees, it was decided that the new corporation was a continuance of the old one. *Miller v. English*, 1 Zab. 317.

¹ *State v. Primm*, 50 Mo. 87.

² *Merchants' Bank v. Cook*, 4 Pick. 405. See *McDaniels v. Flower Brook Manuf. Co.*, 22 Vt. 274; *Vail v. Ham-*

ilton, 85 N. Y. 453; S. C. 20 Hun, 355; *McHenry v. Jewett*, 26 Hun, 453; *Hoppin v. Buffum*, 9 R. I. 513.

³ *Com. v. Gill*, 3 Whart. 228. "Corporate powers are usually distinguished into legislative, electoral, and administrative in private corporations aggregate, though sometimes all of the

holding corporate elections be not prescribed in the charter, such matters fall within the province of the corporation through its by-laws.¹ When the charter provides that the mode of electing directors shall be prescribed in the by-laws of the corporation, and the by-laws name a time and place for such election, and make it the duty of the secretary of the corporation to give notice of the same, but do not state how or when the notice shall be given, the notice must be according to the general law relating to corporations.²

members act immediately in the administration of its affairs. Usually, for the sake of convenience, the direct management is intrusted by the charter to certain officers or board of managers elected by the members at large, though deriving their ordinary powers from the act of incorporation. These officers exercise the legislative and administrative functions; the former in the institution of by-laws for the general government of the company, the latter in the superintendence and execution of its general business. In other instances a select few, representing all those interested in the object of the association, are erected into and invested with all the powers of a corporation; and sometimes selected branches are divided into distinct classes. When the corporate existence is devolved on a board of officers, they not only wield the whole corporate authority, but may apply for and agree to radical changes in the instrument to which they owe the corporate being. When such a board is separated into integral parts occupying distinct positions, both must concur in any act having for its object an alteration in the fundamental law, though in the exercise of the ordinary powers of a corporation they act jointly and are governed by a majority of the united bodies. These in their capacity of

managers have no authority either to call for or assent to a change in the corporate constitution but by the agreement of a majority of the corporators." *BELL, J., in Com. v. Cullen, 13 Pa. St. 113.* Where the charter of a railroad company provided that the government and affairs of the company should be vested in a board of directors chosen by the members at their annual meeting, it was held that this provision was merely directory, the act not implying that elections held at other times should be void. *Hughes v. Parker, 20 N. H. 58.* The charter of an insurance company provided that the affairs of the company should be managed by twenty-three directors to be chosen annually on a specified day and hold their positions for one year. At the election twenty-two persons only were chosen. It was held that the election was valid, and the court ordered a new election to supply the vacancy of one in the board. *Matter of Union Ins. Co., 22 Wend. 591.*

¹ *Newling v. Francis, 3 Term Rep. 189; Matter of Long Island R.R. Co., 10 Wend. 37.*

² *Ibid.* Where the notice of a meeting for the election of directors specified the hour of twelve o'clock M., and the meeting was organized a quarter before twelve, it was held that the election thus held was void, although

Where the act of incorporation provides that after the first election all other elections must be held annually at such time as the by-laws shall direct, until the by-laws specify a time no election can be held; and a provision that the directors may designate a time, can only be operative when, the by-laws having fixed the time, no election is held on that day.¹ The statute having provided that the board of trustees should be annually elected by the stockholders at such time and place and upon such notice as should be directed by the by-laws of the corporation, it was held that unless all of the stockholders were actually present, either in person or by proxy, such annual meeting could not be held until after notice, and that under a by-law directing that annual meetings should be held on the third Monday in April, a notice of a meeting which did not specify the time of day at which the meeting would be held was insufficient.² Where stockholders were restrained from holding their annual election for directors at the time fixed, and the election was held several hours afterward by a minority of the stockholders, without notifying the others, who were near by, and deeply interested in the result of the contest, it was held that the law would not uphold an election conducted in that way.³ An act to incorporate a bank having authorized commissioners appointed by the act, as soon as two thousand shares should be subscribed, to call a meeting for the election of directors by publishing three weeks previous notice in certain newspapers, it was held that the call need not be in a formal order of the commissioners. In such case, a notice published by the secretary of the commissioners, he being one of them, and the names of the others signed by him, will

the meeting was reorganized at twelve. San Buenaventura Manuf. Co. v. People v. Alb. & Susquehanna R.R. Vassault, 50 Cal. 534.
Co., 55 Barb. 344. ³ State v. Bonnell, 35 Ohio St.

¹ Johnston v. Jones, 23 N. J. Eq. (8 10.
C. E. Green) 216.

be deemed their act if not disavowed by them. After the commissioners have advertised a meeting, they cannot adjourn the same at their pleasure (though circumstances may occur in which the exercise by them of the power of adjournment would be justifiable); and if, notwithstanding an adjournment of the meeting by the commissioners, the subscribers proceed to elect their officers, the election will not be avoided unless, in the opinion of the court, a postponement was clearly necessary.¹ A by-law cannot exclude an integral part of the electors, nor impose upon them a qualification inconsistent with the charter, or disconnected from their corporate character.² By a charter, the active members of the corporation were restricted to the number of one hundred, and it was provided that active members might be made honorary members. It was held that honorary members must be elected from active members, and that a by-law that contributing members might be elected in the same way as active members, was void.³ The by-laws of a religious corporation provided that the president should convene the board of trustees at least once a month, and might call extra meetings whenever, in his opinion, or in the opinion of three members, it should be deemed for the interest or welfare of the congregation, and that a majority of the board might admit new members. The president refused to call a meeting, although asked to do so by four members; whereupon, a majority of the board assembled without such call, after notifying the president of the time and place of such meeting. It was held that the board, thus convened, had no power to elect new members.⁴

¹ Hardenburgh v. Farmers' & Mechanics' Bank, 2 Green Ch. 68.

² Willcocks, *ex parte*, 7 Cowen, 402.

³ Diligent Fire Co. v. Com., 75 Pa. St. 291.

⁴ State v. Ancker, 2 Rich. 245. A demand that trustees of a corporation shall do an act which the law especially

enjoins upon them as a duty pertaining to their office, as, for instance, to hold the annual election, need not be made upon the board of trustees in session. A demand upon each trustee separately is sufficient. State v. Wright, 10 Nevada, 167. See Flagg v. Lady Bryan Mining Co 4 Ib. 400.

Where an act of incorporation provided that there should be three directors, out of whom a president should be chosen, it was held sufficient that the president was elected by a legally constituted meeting at the same time with the other directors, without his previous appointment as a director.¹ If the charter of a religious society does not provide a mode of electing the trustees, and there is no by-law on the subject, the usage of the corporation in holding elections for that purpose will govern. Where two meetings are held for the election of trustees on the same day, one at the usual place and in the customary manner, and the other at a different place, the persons voted for who have a majority of votes at the election held at the usual place will be deemed elected, though the candidates voted for in the other place received a majority of all of the votes cast at both places.² The act incorporating a religious society having provided that one-third of the trustees should be chosen annually, at least six days before vacancies, it was held that an election the first Monday after Whitsunday in each year, though a movable holyday, was valid. The court said : "The church having fixed upon a yearly religious epoch for the election of trustees, it would be very revolting to hold the corporation absolutely dissolved from the very first time the elections were so held, and that all its subsequent elections and acts were void merely because the holyday selected for the election did not correspond with the solar year. We cannot, with propriety, have any election that will so correspond, because the calendar day will frequently be the day of the Christian Sabbath, and a given day of the week in any month would not agree precisely with the solar year. We must give the statute a reasonable and liberal construction for the benefit of the churches. Neither a precise day of election, or of entering

¹ Currie v. Mu. Assoc. Soc., 4 Hen. & Munf. 315.

² Juker v. Com., 20 Pa. St. 484.

upon office, is given. There are many decisions in the books, showing that the election in such cases will be valid if made after the year, and especially if an integral part of the corporation remains."¹ An information to remove a corporate officer on the ground that he was elected at an illegal meeting, and deceived the relators as to the time it was to be held, need not allege that they would have voted against him if they had been present.²

§ 50. **Who entitled to vote.**—The object of a stock-book, and of requiring transfers of stock to be entered in it, is to enable the corporation to know who its members are in making dividends, and who have a right to vote in case of an election.³ A person in the lawful possession of a reg-

¹ *People v. Runkel*, 9 Johns. 147. In England, under the statute of 13 Chas. 2d, a person was disqualified for election to a corporate office, who had not, within a year previous to his election, partaken of the sacrament according to the rites of the Church of England, whether or not such disqualification were made known to the electors at the time of the election. If the electors had been apprised of the disqualification before the election, their votes given in favor of the disqualified person were thrown away, and the candidate who had the next greatest number of votes was entitled to the office. But the statute of 50 Geo. 3d, commonly called the indemnity act, provided that if such person afterward qualified himself within the time allowed, he should be regarded as if qualified at the time of the election, provided the office had not been avoided by judgment, or filled by another person. See *Rex v. Parry*, 14 East. 549.

² *Armington v. State*, 95 Ind. 421.

³ *Gilbert v. Manchester Iron Co.*, 11 Wend. 627; *Bank of Utica v. Smalley*, 2 Cowen, 770, 778; *Commercial Bank*

of Buffalo v. Kortright, 22 Wend. 348, 362; *Fisher v. Essex Bank*, 5 Gray, 373, 380; *Hoagland v. Bell*, 36 Barb. 57, 58; *Manning v. Quicksilver Mining Co.*, 24 Hun, 360; *Johnston v. Jones*, 23 N. J. Eq. 216; *State v. Pettinelli*, 10 Nevada, 141; *Beecher v. Wells Flouring Mill Co.*, 1 McCrary, 62. In New York it has been held that a blank transfer on the certificate of stock, to which the holder has affixed his name, is a good assignment, and that a party to whom it is delivered may fill it up by writing a transfer and power of attorney over the signature. As between the parties, the delivery of the certificate, with the assignment and power indorsed, passes the entire title in the shares, notwithstanding the stock is declared by the charter or by-laws of the corporation to be transferable only on the books; such a provision being solely designed for the protection of the corporation. *McNeil v. Tenth National Bank*, 46 N. Y. 325; *N. Y. & N. H. R.R. Co. v. Schuyler*, 34 Id. 30; *Fatman v. Loback*, 1 Duer, 354. See *Jarvis v. Rogers*, 13 Mass. 105; *Duke v. Cahawba Nav. Co.*, 10 Ala. 82. But by "omitting to register his transfer,

ular certificate is entitled to have his stock transferred and to vote, although he may have paid nothing for his stock.¹ But where the act of incorporation provides that no transfer of stock shall be binding on the company until made in the stock-book, and no stockholder shall be permitted to vote at any meeting unless he became a stockholder on the books of the company previous to the meeting, the right to vote is not to be tested by the mere ownership of stock, but by its entry in the stock-book.² If the right to vote be disputed, the corporate books are *prima facie* evidence, and the corporation cannot be required to decide the question otherwise.³ When the directors of a corporation can-

the holder of the certificate and power fails to obtain the right to vote, and may lose his stock by a fraudulent transfer on the books of the company by the registered holder to a *bona fide* purchaser; but in this respect he is in a condition analogous to that of the holder of an unrecorded deed of land, and possesses a no less perfect title as against the assignor and others. And he would have an action as against the corporation for allowing such a transfer in violation of his rights. He also takes the risk of the collection of dividends by his assignor, or any lien the corporation may have on the shares. But in other respects his title is complete." *McNeil v. Tenth Nat. Bank*, *supra*, per RAPALLO, J.

¹ *Downing v. Potts*, 3 Zab. 66; *State v. Leete*, 16 Nevada, 242. See *Savage v. Ball*, 17 N. J. Eq. 142; *Greenville, etc., R.R. Co. v. Coleman*, 5 Rich. 118; *Bailey v. Railroad Co.*, 22 Wall. 604; *Laws of N. Y. of 1880*, ch. 510.

² *Mousseaux v. Urquhart*, 19 La. Ann. 482. In Vermont the capital stock of a corporation may be transferred in the mode provided by its by-laws. *Rev. Laws of Vt. of 1880*, p. 625, sec. 3258.

³ *Matter of Long Island R.R. Co.*, 19

Wend. 37; *Smith v. American Coal Co.*, 7 Lansing, 317; *Matter of North Shore Staten Island Ferry Co.*, 63 Barb. 556; *Johnston v. Jones*, 23 N. J. Eq. 216; *In re Election of St. Lawrence Steamboat Co.*, 44 N. J. 529; *People v. Robinson*, 64 Cal. 373. The person who appears to be the owner of shares on the books of the corporation has the right to be treated as a stockholder, and to vote as such, although his stock has been sold. *State v. Ferris*, 42 Conn. 560. In New York it is provided by law that "in all cases where the right of voting upon any share or shares of the stock of any incorporated company of this State shall be questioned, it shall be the duty of the inspectors of the elections to require the transfer books of said company as evidence of stock held in the said company; and all such shares as may appear standing thereon in the name of any person or persons, shall be voted on by such person or persons directly by themselves, or by proxy, subject to the provisions of the act of incorporation." 2 N. Y. Rev. Sts., 7th ed., 1535. In the same State the act concerning directors of moneyed corporations (Ib. 1369, 1370) provides that "every per-

not get possession of the stock-book, it is their duty to prepare a new one; and when prepared and adopted, it becomes the proper place for entering subsequent transfers of stock. The old book does not, however, cease to be a stock-book of the corporation on the making of a new one. In ascertaining who are voters, the old book must still govern as to transfers recorded there before the new book was opened.¹ In case the real owner wishes to have his name or the true state of facts appear on the books, he has his remedy in equity to compel a proper transfer. If a pledgor and pledgee, or a trustee and *cestui que trust*, agree that either shall represent the stock, or if the facts are admitted, that may answer. But when the real owner acquiesces in the control of stock by the person in whose name it stands on the books without informing the corporation of the facts until a contested election occurs, a court of equity will not interfere with the result.²

Where stock stands on the books of the corporation in the name of a trustee, the entry showing on its face that he is only a nominal holder, the real owner of the stock is the proper person to vote, especially if his name is truly expressed in the books; though it would be otherwise, if he chose to have the entry simply in the name of another,

son offering to vote may be challenged by any other person authorized to vote at the same election; and to every person so challenged, one of the inspectors shall administer the following oath: You do swear (or affirm) that the shares on which you now offer to vote do not belong and are not hypothecated to (naming the corporation for which the election is held), and that they are not hypothecated or pledged to any other corporation or person whatever; that such shares have not been transferred to you for the purpose of enabling you to vote thereon at this election, and that you have not con-

tracted to sell or transfer them upon any condition, agreement, or understanding in relation to your manner of voting at this election." In Virginia, when a vote is offered to be given upon stock transferred within sixty days before the meeting, if any person present object to the vote, it cannot be counted, unless the stockholder make oath that the stock on which such vote is to be given is held by him *bona fide*. Code of Va. 1873, p. 548.

¹ Schoharie Valley R.R. Case, 12 Abb. Pr. N. S. 394.

² Hoppin v. Buffum, 9 R. I. 513.

without stating any trust.¹ Upon the death of a stockholder in a corporation, his administrator becomes, by operation of law, vested with the legal title to the stock and entitled to vote at elections of directors. To give this right, there need not be a formal transfer on the corporate books. The fact that the decedent held the stock subject to a trust would not affect the question. Upon the death of a trustee of personal property, the trust devolves upon his representative, and as to every one except the *cestui que trust*, he is the absolute owner. The right to vote follows the legal ownership, and the corporation has nothing to do with the equities between the owner and third persons.² If stock be hypothecated, so long as it remains in the pledgor's name on the books of the corporation, he is entitled to vote. It is a question between him and the pledgee with which the corporation has nothing to do.³ Where stock had been transferred to the plaintiff as collateral security, a decree was made requiring the pledgee to give the pledgor a proxy to vote on the stock.⁴

§ 51. **Voting by proxy.**—At common law members cannot vote in this manner.⁵ There is usually an express provision,

¹ *Wilson v. Proprs. of Cent. Bridge*, 9 R. I. 590. In *State v. Hunter*, 28 Vt. 594, the stock proposed to be voted upon was bank stock held in trust for a person not a citizen of the State, and who for that reason was prohibited by statute from holding stock in a bank in Vermont. It was held that the statute could not be evaded by putting the stock in the name of another.

² *Matter of North Shore Staten Island Ferry Co.*, 63 Barb. 556. In Wisconsin it is provided by statute that "every executor, administrator, guardian, or trustee shall represent the shares of stock in his hands at all meetings of the stockholders, and may vote thereat as a stockholder." Rev. Sts. of Wis. 1878, p. 513, sec. 1760.

³ *Willcocks, ex parte*, 7 Cowen, 402.

See *McDaniels v. Flower Brook Manf. Co.*, 22 Vt. 274. The general property which the pledgor is said to retain is a legal right to the restoration of the thing pledged on payment of the debt. *Wilson v. Little*, 2 N. Y. 443.

⁴ *Vowell v. Thomson*, 3 Cranch C. C. 428.

⁵ *Taylor v. Griswold*, 14 N. J. (2 Green) 222; *Craig v. First Presbyterian Church*, 88 Pa. St. 42; *Com. v. Bringhurst*, 103 Id. 134; S. C. 49 Am. Rep. 119. By the civil law members could not vote by proxy "unless custom had ruled it otherwise; because of the mischief and inconvenience that might attend such a practice by having only a few of its members assembled in council, and likewise to restrain the contumacy of others." *Ayliffe Civ. L.* 202.

either in the charter or in some general statute, permitting it to be done. It was held, however, in an early case in Connecticut, that the right to vote by proxy, in the case of moneyed corporations, might be delegated by the by-laws when the charter was silent. On an information in the nature of a *quo warranto*, alleging that the defendant had usurped the office of director of the Hartford Bridge Company, the principal question was whether it was competent for the members of the company to vote by proxy in the choice of its officers. There was no clause in the act of incorporation empowering the members to do so, but power was given to establish such by-laws and regulations as the company deemed necessary for its government, not contrary to the charter or laws of the State. The court below charged the jury that votes given by proxy were illegal. The Supreme Court, in taking the opposite view, said: "Those incorporated societies whose object is the acquisition of property, stand on a different ground on this question from those of every other kind. That is to say, it is not so clear that every vote given in a corporation of the former kind must be personal, as it is that it must be so in the latter. I agree most fully that by the common law every vote given in a corporation instituted for the public good,—either the good of the whole State, or a particular town or society,—must be personally given. So also every vote given by a freeman for his representative must be given by him in person. There is no deviation from this rule. The authorities on this subject are uniform. But from the very nature of a moneyed institution, the mere owning of shares in the stock of the corporation seems, of course; to give a right of voting. But whatever might have been the result of reasoning on the nature of moneyed institutions, still, since the passing of the by-law above mentioned, I am very clear that the votes for the officers of this corporation, as well as all other votes in relation to it, may be given by

proxy.”¹ But in New York, in the case of a corporation for the draining of certain lands, the chancellor, with reference to a claim of members to vote by proxy, though the question did not necessarily arise, said : “ The right of voting by proxy

¹ *State v. Tudor*, 5 Day, 329. See 2 Kent's Com., 9th ed., 358. In New Jersey, on an application, which was denied, to set aside an election for directors of the Passaic and Hackensack Bridge Company, on the ground, among others, that the inspectors acted contrary to law in rejecting votes which were offered by proxies, Chief Justice HORNBLOWER said : “ If corporations have a right to dispense with the personal attendance of their members to conduct their affairs, and decide their elections by the instrumentality of proxies or attorneys, we must find it in the elementary principles of the institution ; in the nature, design, and fundamental constitutions of corporations ; or in some new and positive enactment or grant of the creating power. In other words, we must find such authority among the incidental rights and attributes of all corporate bodies, or in some special power granted by the government to the particular corporation in question. . . . Such a power is not essential, nor even apparently necessary, to carry into effect the objects for which corporations are generally created. . . . What, then, were the object and design of the legislature in creating this corporation ? That it was not for the purpose of instituting a stock company merely, or principally for the acquisition of property, will appear in the sequel of this investigation. It was to enable the owners or lessees of certain existing property, in the preservation and good management of which the public had a deep and important interest, to adopt such measures as would give permanency and security to the institution, and be calculated to

promote their own and the public benefit. If, from the nature of things, this charter would be inoperative, or in any measure fail to effect or secure the benign objects the legislature had in view, unless we annex to it the power of making such a by-law as the one under consideration, then it follows that the corporation has the power by implication and as incident to the charter. But that the right of voting by proxy is essential to the attainment of the objects and design of the charter will not be seriously pretended. If we test the validity of the by-law in question, or the incidental right of the corporation to make it by the latter branch of the rule just quoted, viz., the apparent good of the corporation, the claim will be found equally untenable. It may be for the personal convenience of members, but it cannot be for the good of the corporation that its business or election should be conducted by proxies. The interest of the company and the good of the public would be better promoted and more effectually secured by the personal attendance of, and mutual interchange of opinions among, the members, than by the action of proxies. At least, this is the fair and legal presumption. If one member may appear and vote by proxy at elections, and on other matters of vital importance to the institution, then all may, and so the welfare and interest of the company and of the public be utterly neglected. In short, so far from being incident to a corporation to make such a regulation, it is at variance with the spirit and with the fundamental principles of our civil and political institutions. . . . In religious, literary, and benevolent

is not a general right, and the party who claims it must show a special authority for that purpose. The only case in which it is allowable at common law is by the peers of England, and that is said to be in virtue of a special permission of the king. And it is possible that it might be delegated in some cases by the by-laws of a corporation where express authority was given to make such by-laws regulating the manner of voting. I am not aware of any other case in which the right was ever claimed; and the express power which is generally given to the stockholders of moneyed and other private corporations is opposed to the claims in this case, where there is no express or implied power contained in the act. I therefore think the decision of the inspectors correct in rejecting the votes offered under the proxies."¹ It is provided by statute in Maine, Michigan, Indiana, Rhode Island, and Delaware, that corporations may determine by their by-laws the mode of voting by proxy.² In Wisconsin, stockholders may vote either in person or by proxy at every election of officers, and at

societies, no such right has ever been lawfully exercised so far as I can learn. We must look for it then among that class of private corporations which consists of canal, railroad, bridge, turnpike, banking, and trading companies. But public good is the avowed object of all such institutions; and however private property and emolument may be involved, the public have a deep and important interest in the government and success of every one of them. In short, they are all, in an important sense, public institutions. A bank, whose stock is exclusively owned by individuals, is, in a legal sense, a private corporation; but its objects and operations partake of a public nature, and the same may be affirmed of insurance, canal, bridge, turnpike, and railroad companies. . . . There is then, in my opinion, no such plain and palpable

distinction between such corporations as are instituted for the acquisition of property, and such as are created for the public good, or the good of a particular town or society, as will justify the court in allowing to the one, and refusing to the other, a course of proceedings unknown to the common law and at variance with its salutary principles on this subject." Taylor v. Griswold, 2 Green, 222. See opinion of FORD, J., in the same case, coinciding with the foregoing views.

¹ Phillips v. Wickham, 1 Paige Ch 500. See People v. Twaddell, 18 Hun, 427; Craig v. First Presb. Church, 88 Pa. St. 42.

² Rev. Sts. of Me. 1871, p. 394, sec. 5; Comp. Laws of Mich. 1871, p. 1148; Sts. of Ind. 1870, p. 268; Pub. Sts. of R. I. 1882, sec. 3; Rev. Code of Del. 1874, p. 376.

other meetings, when the by-laws so provide.¹ In Virginia each stockholder may vote either in person or by proxy.² In New York the statute provides that "No person shall be permitted to vote upon the proxy of a stockholder unless he shall produce, annexed to his proxy, an affidavit of such stockholder, stating the same facts to which the oath of such stockholder might have been required upon a challenge had he offered to vote in person on the shares mentioned in the proxy. If any person offering to vote upon a proxy shall be challenged by an elector, he shall be required to take the following oath, to be administered to him by one of the inspectors: You do swear (or affirm) that the facts stated in the affidavit annexed to the proxy under which you now offer to vote, are true according to your belief, and that you have made no contract or agreement whatever for the purchase or transfer of the shares, or any portion of the shares mentioned in such proxy."³ Where the charter provided that each person being present at the election should be entitled to vote, and there was no provision in relation to voting by proxy, it was held that the word "present" was to be taken to mean an actual, not a constructive presence.⁴ A power of attorney to vote upon stock, with the addition that the power is irrevocable, and that there are certain privileges reserved to the owners of the stock in regard to the manner of dealing with it and withdrawing from the arrangement, is not contrary to public policy, or open to objection.⁵

¹ Rev. Sts. of Wis. 1878, p. 513, sec. 1760.

² Code of Va. 1873, p. 548.

³ 2 N. Y. Rev. Sts., 7th ed., 1369, 1370. See *Matter of Election of St. Lawrence Steamboat Co.*, 44 N. J. 529.

⁴ *Brown v. Com.*, 3 Grant's Cas. 209. LEWIS, C. J., said: "It seems reasonable to hold that in a case where the shareholders are embarked in a common enterprise, and where the vote of

each affects the interest of the others in the management of the concern, the election of directors shall take place under circumstances favorable to a consultation with each other, so that they may have the benefit of each other's views and information relative to the common interest. This can only be done by requiring the stockholders to be present when voting."

⁵ *Brown v. Pacific Mail Steamship*

§ 52. **Special qualifications of voters.**—If the power to elect directors be given to the stockholders by statute, the corporation cannot, by its by-laws, either give or take the power away. Were the statute silent on the subject, the election of the directors would be subject to the regulation and control of the corporation. But where the statute declares who shall be entitled to vote, its provisions are imperative upon the corporation constituting the law of its being, and the corporation cannot extend or limit the right.¹

When the qualifications of voters are named in the charter, the right to vote in a given case will, of course, depend upon the language and construction of the charter. The act incorporating a religious society provided that members who had subscribed to the building of the church, or who should thereafter contribute any sum of money not less than ten shillings annually toward the support of the church, should be entitled to vote. It was held that those who had contributed the sum named shortly before the election, or less than a year previous, were not annual contributors within the meaning of the act, and had no right to vote, although they contributed with the intention of becoming members of the society.² An act for the incorporation of religious societies which provides that no person shall be entitled to vote at an election held by any such society until he shall have been a stated attendant on divine worship in the congregation or society at least one year before the election, means regular attendance at the stated times for worship, as distinguished from occasional

Co., 5 Blatchf. 525. See *Fisher v. Bush*, 35 Hun, 641. A by-law of a benevolent society authorizing its members to vote by proxy, was held valid, and it was held that the proxies would be presumed regular, no objection having been made to their form, execution, or validity. *People v. Crossley*, 69 Ill. 195.

¹ *Brewster v. Hartley*, 37 Cal. 15. The right to judge of the qualification and election of its members is a power necessarily incident to a State medical society. *State v. Medical Society*, 38 N. J. 377.

² *Juker v. Com.*, 20 Pa. St. 484.

attendance. The attendance must be personal, that of the wife or other member of the family not being sufficient, and no amount of contribution to the support of the church or society can be accepted in lieu of the requirement.¹ By the original charter of a religious corporation the right of voting was given to "the contributing members being communicants." A subsequent act confirmed this charter, with some amendments, one of which was, that no person should have a right to vote who was under the age of eighteen years. It was held that a member was not entitled to vote unless he had partaken of the sacrament after the age of eighteen years.²

§ 53. **Number of votes allowed to each share.**—At common law each corporator is only entitled to a single vote, notwithstanding he may own a number of shares;³ but, as a rule, in joint stock corporations, each member is allowed as many votes as he has shares. In Wisconsin it is provided that "every stockholder of any corporation shall be entitled to one vote for each share of stock held and owned by him at every meeting of the stockholders and at every election of the officers thereof."⁴ In Maine, Michigan, Delaware, and Rhode Island corporations may by their by-laws determine, where no other provision is specially

¹ *People v. Tuthill*, 31 N. Y. 550.

² *Weckerly v. Geyer*, 11 Serg. & Rawle, 35. It was determined in an old case that literal compliance with the charter of a municipal corporation as to the persons who took part in an election would be dispensed with when the public good would thereby be promoted. In the case of *The Corporators*, 4 Co. 78, decided in the reign of Elizabeth, several towns had been incorporated by charter which directed the election of mayor, bailiff, aldermen, etc., to be by the commonalty or burgesses generally; but by long continued usage those elections had been

made by a select number of the principal persons of the commonalty or burgesses, and not by the commonalty or burgesses at large. It was held, after great deliberation and conference among all the judges, that the elections were lawful, because the regulations under which they were conducted tended to prevent disorder and confusion, and was therefore for the benefit of the corporation.

³ *Taylor v. Griswold*, 14 N. J. (2 Green) 222; *Com. v. Conover*, 10 Phila. 55.

⁴ *Rev. Sts. of Wis.* 1878, p. 513, sec. 1760.

made, the number of shares that shall entitle the members to one or more votes.¹ In Indiana it is provided by statute that each stockholder shall have one vote for each share owned and held by him for ten days previous to the meeting of the corporation.² In Virginia, in a meeting of stockholders of an incorporated joint stock company, each stockholder may, in person or by proxy, give the following vote on whatever stock he may hold in the same right, to wit: one vote for each share of said stock not exceeding ten, and one vote for every four shares exceeding ten.³ In Pennsylvania, section 4, article 16, of the new constitution provides that "in all elections for directors or managers of a corporation each member or shareholder may cast the whole number of his votes for one candidate or distribute them upon two or more candidates as he may prefer." This section is understood to confer upon an individual stockholder the right to cast all the votes his stock represents, multiplied by the number of directors to be elected, for a single candidate, should he think proper. Thus, a stockholder who owned one share would have ten votes for any one of ten candidates or five for each of any two he might choose to select.⁴ By the common law a casting vote sometimes signifies the single vote of a member who never votes but in the case of an equality; sometimes the double vote of a person who first votes with the rest, and then, upon an equality, creates a majority by giving a second vote. A casting vote neither exists in corporations nor elsewhere, unless it is expressly given by statute or charter, or, what is equivalent, exists by immemorial usage, and in such cases it cannot be created by a by-law.⁵ A charter creating a corporation gave the bailiffs and alder-

¹ Rev. Sts. of Me. 1871, p. 394, sec. 5; Comp. L. of Mich. 1871, p. 1148; Rev. Code of Del. 1874, p. 376; Public Sts. of R. I. 1882, p. 368, sec. 3.

² Sts. of Ind. 1870, p. 268.

³ Code of Va. 1873, p. 548.

⁴ Hays v. Com., 82 Pa. St. 518; Pierce v. Com., 104 Id. 150.

⁵ 1 Blk. Com. 181, n; Jac. L. Dict.

men, or a major part of them, power to choose a senior bailiff. A by-law was passed giving to the senior bailiff the casting voice in cases wherein the election of bailiffs, aldermen, or other officers the voices should happen to be equal. The by-law was held void; but it was stated by Lord KENVON, Ch. J., and LAWRENCE, J., that if the provision of the by-law had been incorporated in the charter, the senior bailiff would have had, in case of an equality of votes, a double vote.¹

§ 54. **Corporation not allowed to vote on its own stock.**—Stock cannot be held by a corporation for the purpose of being voted upon, though held in the name of trustees. “This necessarily follows, unless it can be shown that a corporation can become a stockholder of its own stock, receive from itself dividends, respond to calls for assessments, and be responsible for the debts, first as a corporation, and second as a stockholder.”² The capital stock of a railroad company was divided into two thousand shares, which were issued to the original stockholders; and afterward four hundred of these shares were transferred by some of the stockholders to C., “to hold for the benefit of the corporation.” It was held that until the shares were sold and transferred by authority of the company, the right of voting upon them was suspended.³ An election of directors of an insurance company was set aside because a trustee had been allowed to vote upon stock belonging to the company; the principle being that it could not be tolerated that the officers of a moneyed institution should wield such stock, however obtained, to control the result of an election of directors.

¹ Rex v. Gniver, 6 Term Rep. 732. Ann. 482; Brewster v. Hartley, 37 See Rex v. Bumpstead, 2 Stew. 231; Cal. 15; Vail v. Hamilton, 85 N. Y. State v. Adams, 2 B. & Ad. 699; People v. Rector, etc., of Church of the Atonement, 48 Barb. 603. 453; 20 Hun, 355; Am. Railway Frog Co. v. Haven, 101 Mass. 398.

³ Brewster v. Hartley, *supra*.

² Mousseaux v. Urquhart, 19 La.

It was said in this case, "The court never could have doubted the right of a person to vote upon stock standing in his name, although held by him in trust for another; the legal estate is in him, and until divested by assignment, either voluntary or compulsory, he is the only person entitled to vote."¹ Where the court were satisfied by affidavits that thirteen of the persons returned as duly elected directors were elected by a vote upon stock owned by the company, and that other persons were elected directors by a large majority of votes upon outstanding stock, the election of the thirteen was vacated and the others declared duly elected.² But a corporation may from necessity take its own stock in pledge or payment and keep it outstanding in trustees to prevent its merger.

§ 55. Keeping polls open.—When no time is specified by law within which the polls are to be kept open, the duration of the time must be left to the sound discretion of the inspectors.³ The time should, of course, be long enough to afford all of the stockholders present an opportunity to vote.⁴

§ 56. Proof of result of election.—The certificate of the inspectors of election as to what was done on that occasion is admissible; and it may also be proved who were elected by those who were present at the time, the books of the corporation not being the sole evidence on that point. So, the fact that certain persons have acted as directors may be proved by witnesses to show that they are such.⁵ The presumption of law is, that an officer of a corporation was legally chosen when there is nothing in the record to show the contrary.⁶ The plaintiff had performed services as clerk

¹ Am. Railway Frog Co. v. Haven, *supra*.

² Holmes, *ex parte*, 5 Cowen, 426. See Matter of Barker, 6 Wend. 509.

³ Matter of Chenango County Mu. Ins. Co., 19 Wend. 635.

⁴ People v. Albany & Susquehanna R.R. Co., 55 Barb. 344.

⁵ Partridge v. Badger, 25 Barb. 146. As to inspectors of election to choose directors, see State v. Merchant, 37 Ohio St. 251.

⁶ Mussey v. White, 3 Me. 290; Blanchard v. Dow, 32 Id. 557; U. S. v. Dandridge, 12 Wheat. 64.

of a religious corporation for which he had received some payments. The records of the society contained entries of the payment of money to the plaintiff for his services on several occasions. But no resolution was entered on the minutes or records of the corporation, appointing him clerk of the church. It was held that evidence of such a vote or resolution was unnecessary.¹ By an act authorizing the incorporation of a religious society, it was provided that at the first election of the vestry, the rector, or if there were none, or he was necessarily absent, one of the wardens or other person, should preside, who should unite in the certificate filed under the act. The certificate showed that the rector did not preside at the election, and it did not appear from the certificate or in any other way that he was necessarily absent. It was held that the fact that he was necessarily absent would be presumed, if required to give validity to the act of incorporation.² Where, under the act of New York for the incorporation of religious societies requiring that the presiding officers should be nominated by a majority of the members present, the certificate stated that they were chosen by a plurality of votes, without negating that they were nominated by a majority, it was held that, in the absence of evidence to the contrary, it would be presumed that they were chosen in accordance with the statute.³

§ 57. **Validity of election.**—When a stockholder omits to vote, he virtually consents that the election shall be made

¹ *Dunn v. St. Andrew's Church*, 14 Johns. 118. The minutes ought to be entered at the meeting, and not after it separates. Such entries are not evidence of an appointment, or of any other act or thing that ought to be done under the common seal. *Reg. v. Mayor, etc., of Stamford*, 6 Q. B. 433.

² *All Saints' Church v. Lovett*, 1 Hall, 191.

³ *Meth. Epis. Church v. Picket*, 23 Barb. 436; *S. C.* 19 N. Y. 436. Votes given for a candidate who is ineligible will not be thrown out so as to give the election to the opposing candidate unless it was known by those who voted that the candidate voted for was ineligible. *In re St. Lawrence Steamboat Co.*, 44 N. J. 529.

by those who think proper to exercise their privilege, and he cannot afterward object that they have selected officers of whom he does not approve; the presumption being that all of the members present who remain silent when a question is distinctly put, concur with those who vote.¹ If a member vote for part only of the officers to be chosen, he waives his privilege as to the residue, and tacitly consents that the other members may select such persons as they deem proper.² A member will not be permitted to impeach a title conferred by an election in which he was concerned; it being presumed that every corporator was cognizant of that which has recently taken place in the corporation, unless he shows the contrary. The principle is, that whatever may have been the conduct of the corporate body, if the corporator has acquiesced—if he has in any way knowingly sanctioned it, or done or assisted in doing anything at all affected by the objectionable matter—he will be concluded by his acquiescence, and the court will not relieve him.³ Whoever has a majority of those who vote, the assembly being sufficient, is elected, although a majority of the entire assembly abstain from voting, because their presence suffices to constitute the elective body; and if they neglect to vote, it is their own fault, and will not invalidate the act of the others, but be construed an assent to the determination of the majority of those who

¹ *Worrell v. First Presby. Church*, 23 N. J. Eq. 96.

² *Matter of Union Ins. Co.*, 22 Wend. 521. But see *State v. Petinelli*, 10 Nevada, 141. Owners of less than half of the stock of a corporation may elect directors when the other shareholders are restrained from voting. *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. 525. Stockholders who do not vote against the re-election of directors must be deemed to have acquiesced in the acts of the directors done prior to their

re-election, of which such stockholders had information sufficient to put them upon inquiry. *Ramsey v. Erie R.R. Co.*, 7 Abb. Pr. N. S. 156. An objection to an election cannot be made by one who was not a stockholder at the time of the election, and received his stock from a person who took part in the proceeding. *In re Syracuse, etc.*, R.R. Co., 91 N. Y. 1.

³ *Rex v. Slythe*, 6 Barn. & Cress. 240 (13 Eng. Com. L.).

do vote. Such an election is valid, although those who do not vote protest against any election at that time, or against the election of the individual who has the majority of the votes. The only way in which they could have prevented his election was by voting for some other qualified person.¹ A rule was granted against commissioners to receive subscriptions to the capital stock of a bank to show cause why a mandamus should not issue directing them to reapportion the stock, and also a rule against the president and directors of the bank to show cause why an information in the nature of a writ of *quo warranto* should not be exhibited against them for exercising their respective offices. It appeared that the election was conducted pursuant to directions made by a public meeting, and according to the scale of votes adopted by the meeting; that no vote was challenged; and that the result of the election in favor of the respondents was reported to a meeting of the stockholders, without objection from any one. The respondents further showed that the relators confirmed the apportionment of the stock by their acquiescence in the proceedings of the meeting, by receiving repayment of the surplus shares, by voting according to the scale of votes made by that apportionment, and by consenting to the votes of others; that the election produced great excitement between the rival parties, in which the relators and respondents were adversary

¹ Willcock on Corp., sec. 546. See *Booker v. Young*, 12 Gratt. 303. In *Rex v. Slythe*, *supra*, ABBOTT, C. J., said: "It has generally been considered a rule of corporation law, that a person is not to be permitted to impeach a title conferred by an election in which he has concurred, or the title of those mediately or immediately derived from that election." In *Rex v. Treveneux*, 2 B. & A. 343, it was held that, as to the defendant, his having concurred in the election was a fatal

objection. He was bound as a corporator to have known that the title of the candidate to the office of alderman was bad, and his having concurred in an act which depended for its validity upon the circumstance that the incumbent was at that time an alderman, prevented him from having the right to impeach that title; the principle governing all such cases being acquiescence in the objectionable election at the time.

to each other; that the relators' friends resorted to five-share subscriptions, under powers of attorney, and voted on those shares, which the relators now alleged to be illegal; and that it was not until after the relators had been defeated that they discovered any objection to the proceedings which they sought to impeach. The decision of the circuit court in favor of the respondents was affirmed on appeal.¹ The rule as to the waiver of the privilege of voting may of course be changed by law. A statute provided that the county superintendent of schools should be chosen *viva voce* by a majority of the whole number of directors *present*. The certificate of the proceedings recited that S. was declared duly elected *viva voce* by a majority of the members *voting*, and then proceeded to declare that the whole number of directors was 112, of whom 56 voted for S., and that K. received 55 votes, one member refusing to vote. It was held that there was no election.² To warrant setting aside an election, on the ground that improper votes were received, it must be shown affirmatively that the successful ticket received improper votes, which if rejected would have reduced it to a minority; the mere circumstance that improper votes were received not being sufficient to vitiate an election.³

Fraud will of course vitiate the proceedings. Where a true list of the stockholders entitled to vote, and of the shares held by each was not exhibited at the meeting, and the list was false and known to be so by the parties who exhibited it, it was held that the election was illegal.⁴ Where

¹ State v. Lehre, 7 Rich. 234.

² Com. v. Wickersham, 66 Pa. St. 134.
See Everett v. Smith, 22 Minn. 53.

³ Murphy, *ex parte*, 7 Cowen, 153;
M'Neely v. Woodruff, 13 N. J. L. (1 Green) 352; Madison Avenue Baptist Church v. Baptist Church in Oliver Street, 5 Robt. 649; Craig v. First Presbyterian Church, 88 Pa. St. 42.

An election of A. to a corporate office in place of a supposed vacancy created by B., cannot be referred to an existing vacancy created by C. Rex v. Smith, 2 Maule & Selw. 406.

⁴ Johnston v. Jones, 23 N. J. Eq. (8 C. E. Green) 216. In Campbell v. Poultney, 6 Gill & Johns. 94, it was alleged that transfers of stock had been

the majority of the corporators propose to benefit themselves at the expense of the minority, the court may interfere to protect the minority.¹ The following agreement, entered into by ten persons, was held in restraint of trade, against public policy, and void: For value received, we, the undersigned, stockholders of, etc., mutually agree that we will not sell, pledge, or give power of attorney to vote, or agree to sell, etc., the stock we respectively and individually own, without the consent of all the signers to this instrument. This agreement is made for mutual protection, and to prevent the sale of the company's franchise by a majority of the present board of directors, who represent a minority of the capital stock.² But an agreement to combine stock for the purpose of terminating mismanagement, and effecting a change in the direction through the instrumentality of a majority of votes at a regular election, is not in conflict with the requirements of the law, and in no wise derogates from its policy.³

colorably made for the fraudulent purpose of increasing the number of votes in violation of the provisions of the charter of the company, and an injunction was asked to restrain the fraudulent transferees from voting. It was held that the facts set forth in the bill were a violation of the principles and spirit of the charter, and if carried into effect would be a practical fraud upon the complainants, and in derogation of their chartered rights for the protection of which an injunction was the appropriate remedy. On a similar state of facts, the same was held in *Webb v. Ridgely*, 38 Md. 364. But an injunction will not be granted upon the complaint of a minority of a board of directors to restrain a stockholder from voting upon an alleged excess of stock held by him, before the company has taken steps to cancel the stock. *Reed v. Jones*, 6 Wis. 680.

¹ *Menier v. Hooper's Tel. Works, L. R. 9, Ch. 350*; *Barr v. N. Y., etc., R.R. Co.*, 96 N. Y. 444.

² *Fisher v. Bush*, 35 Hun, 641. See *Currier v. N. Y., etc., R.R. Co.*, *Ib.* 355; *Goodin v. Cincinnati, etc., Canal Co.*, 18 Ohio St. 169.

³ *Havemeyer v. Havemeyer*, 43 N. Y. Super. Ct. 506. A majority of the owners of stock in a mining corporation may lawfully agree that they will elect the directors, and determine as to the officers and management of the corporation, and that if they cannot agree they will ballot among themselves for directors and officers, and their vote be cast as a unit, so as to control the election. *Faulds v. Yates*, 57 Ill. 416. A majority of the corporators cannot by their votes authorize the officers of the corporation to lease its property to themselves. *Meeker v. Winthrop Iron Co.*, 17 Fed. Rep. 48. See *Reilly v.*

A court of equity has not jurisdiction to pass upon the validity of the election of the officers of a private corporation, and pronounce judgment against them.¹ But when the question of the right or power of an officer to represent or bind a corporation arises incidentally in the course of a suit of which equity may properly take cognizance, and it becomes necessary to look into the legality of his election, in order to properly determine the rights of the parties, the court will pass upon his title and capacity as it would upon any other question of law or fact necessarily arising. The decision would not, however, settle the right to the office, or vacate it if the party were in actual possession.² In New York, the revised statutes³ provide that if any person shall conceive himself aggrieved by an election of directors or officers in a moneyed corporation, he may apply to the Supreme Court for redress, giving a reasonable notice of his intended application to the party to be affected thereby. The Supreme Court is thereupon required to proceed in a summary manner to hear the proofs and allegations of the parties, or otherwise to inquire into the causes of complaint, and to make such order, and grant such relief, as the circumstances and justice of the case may seem to require. If the election be set aside, the court may order a new election, and appoint a time and place therefor. The court, if it cannot otherwise arrive at a satisfactory result, may order an issue between the parties, to be made up in such manner and form, and to be tried in such court as they shall select; or may permit or direct the attorney-general to file an information in the nature of a *quo warranto*, if the case is

Oglebay, 25 W. Va. 36; Ervin v. Oregon R.R. & Nav. Co., 20 Fed. Rep. 577. A court of equity will not decree the specific performance of an agreement to sell certain shares of stock in a bank which the complainant seeks to obtain in order to control the bank. Foll's Appeal, 91 Pa. St. 434. See

Wright v. Oroville Mining Co., 40 Cal. 20.

¹ Owen v. Whitaker, 20 N. J. Eq. (5 C. E. Green) 122.

² Johnston v. Jones, *supra*; Mechanics' Nat. Bank of Newark v. Burnet Manf. Co., 32 N. J. Eq. (5 Stewart) 236.

³ 7th ed., vol. 2, pp. 1370, 1371.

one in which that proceeding would be appropriate. If an issue is ordered, or information filed, it is the duty of the Supreme Court to make such further order in relation to the time and mode of pleading, the examination of witnesses, or the parties, the production of books and papers, and the time and place of trial or hearing, as will in its judgment be effectual in saving the parties expense, and causing a final determination to be had with the least possible delay. Under the foregoing provisions, the court is not concluded by the entries in the transfer book, but may go behind it to try the rights of the respective claimants.¹

The taking of an oath may or may not in a given case be deemed essential to the validity of an election. It was held in New York that an election of directors would not be set aside on the ground that the inspectors of election were not sworn according to law.² But in England, where an alderman omitted to take the oath and subscribe the declaration of renunciation of the solemn league and covenant required by the act of 13 Chas. 2d, until four years afterward, it was held that his election to the office was void, although the oath and declaration were not tendered to him.³ It was decided not a valid objection to the admissibility in evidence of the records of a manufacturing company that they were kept by a clerk who was not sworn to the faithful discharge of his duty, pursuant to the statute. The court said: "In this particular, as in many others of a like character, the statute must be deemed to be directory only.

¹ Strong v. Smith, 15 Hun, 222; Thompson v. Soc. of Tammany, 17 Id. 305.

² Matter of Mohawk & Hudson R.R. Co., 19 Wend. 135; Matter of Chango Co. Mu. Ins. Co., Ib. 635.

³ Rex v. Sanchar, 2 Shower, 66. Under the statute referred to in the text, the election to the office was void by the non-description of the declara-

tion at the time the alderman took the oath. But by 5th Geo. 1st, ch. 6, the disability for the foregoing cause was taken away, and also for omitting to take the sacrament, unless removal from the office by the corporation or prosecution was resorted to within six months after the election. Ib. 67, *note*. See Rex v. Courtney, 9 East. 246.

It confers the power of electing a clerk, and gives the sanction of an oath as a security to the corporation for the faithful performance of his duties. Such a provision is similar in its nature to those requiring officers to be chosen on a certain day, and treasurers and cashiers to give bonds. They are required only for the security of the corporation, and to insure its due regulation and government, and fidelity on the part of its officers, but not as essential to the validity of corporate acts or the performance of official duties. They cannot be construed as conditions precedent, unless they are made so by the express terms of the statute. The breach or neglect of such provisions of law, although only directory in their character, may render officers personally liable for violation of duty, or subject a corporation to proceedings on the part of the government for a disregard of the requisitions of its charter; but it does not impair the validity of its recorded acts so far as to affect the rights of third parties."¹

§ 58. **Failure to hold election.**—So long as the capacity to elect remains in the members, a corporation does not become defunct from a simple neglect to elect officers, and, notwithstanding a clause in the charter that they shall be elected annually, they may be elected afterward.² "The

¹ *Stebbins v. Merritt*, 10 Cush. 27. See *Hastings v. Blue Hill Turnp. Corp.*, 9 Pick. 80; *Bank of U. S. v. Dandridge*, 12 Wheat. 67, 87, 88.

² *People v. Runkin*, 9 Johns. 147; *Vernon Soc. v. Hills*, 6 Cowen, 23; *Kelly v. Wright*, 1 Root, 83; *McCall v. Byram Manf. Co.*, 6 Conn. 428; *Evarts v. Killingworth Manf. Co.*, 20 Id. 447; *Rose v. Turnpike Co.*, 3 Watts, 46; *Lehigh Bridge Co. v. Lehigh Coal Co.*, 4 Rawle, 9; *Russell v. McClellan*, 14 Pick. 63; *Knowlton v. Ackley*, 8 Cush. 94; *Wier v. Bush*, 4 Litt. Ky. 433; *Smith v. Natchez Steam-*

boat Co., 2 How. Miss. 478; *Blake v. Hinkle*, 10 Yerg. Tenn. 218; *Nashville Bank v. Petway*, 3 Humph. 524; *Com. v. Cullen*, 13 Pa. St. 133. A neglect of the corporation to hold annual meetings will not dissolve the corporation—*State v. Barron*, 58 N. H. 370. See *Barron Creek Ditching Co. v. Beck*, 99 Ind. 247;—nor a cessation of active business. *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279; *Lockwood v. Nat. Bank*, 9 R. I. 308; *State v. Young*, 51 Ill. 149. Neglect to choose officers does not dissolve a private corporation, but as a general rule the old officers

non-existence of the managers does not suppose the non-existence of the corporation. The latter may be dormant, its functions may be suspended for the want of the means of action, but the capacity to restore its functionaries by means of new elections may remain. When, therefore, the election of its managers, directors, or other officers is by the charter to be conducted solely by the stockholders, the charter or act of incorporation not requiring the managers, directors, or other officers to preside at, or to do any act in relation to, the election, a failure to elect such officers on the charter day will not dissolve the corporation, but the election of the officers may take place on the next charter day.”¹ In England, previous to the statute of 11 Geo. I., ch. 4, which provided that a municipal corporation should not be dissolved by a neglect to elect its annual officers on charter day, it was doubted whether such failure would have that effect; and after the passage of that act, it was questioned whether it introduced a new rule, or was only declaratory of the common law.² A mayor was to be

hold over until new ones are chosen. *St. Louis Domicile Assoc. v. Augustin*, 2 Mo. App. 123; *Harris v. Miss., etc., R.R. Co.*, 51 Miss. 602. In *Phillips v. Wickham*, 1 Paige Ch. 595, the Chancellor said: “I am not aware of any general principle of the common law which authorizes all civil or corporate officers to hold over after the expiration of the time for which they were elected until their places were supplied by others; and the numerous statutes both here and in England giving such authority in express terms, seem wholly inconsistent with any such common law principles.” *People v. Runkin, supra, contra.*

¹ *People v. Twaddell*, 18 Hun, 427, per DANIELS, J.; *Reilly v. Oglebay*, 25 W. Va. 36; *Smith v. Silver Valley Mining Co.*, 64 Md. 85.

² See opinion of BULLER, J., in *Rex v. Pasmore*, 3 Term Rep. 199, 245, 256; and also opinion of CHURCH, J., in *Bethany v. Sperry*, 10 Conn. 200. Officers *de facto* are in *colore officii*, and their acts will be valid and binding on the corporation until they are lawfully removed. *Doremus v. Dutch Reformed Church*, 2 Green’s Ch. 332; *Cahill v. Kalamazoo Mu. Ins. Co.*, 2 Doug. 124; *Mechanics’ Nat. Bank of Newark v. Burnet Manf. Co.*, 32 N. J. Eq. 236. Where directors have been regularly elected and entered upon the duties of their office, they will continue to be directors until their successors are duly elected and qualified, though they may for a time be interrupted in the discharge of their duties. *State v. Bonnell*, 35 Ohio St. 10.

chosen among aldermen who were to be elected annually. It appeared that the aldermen present at his election had been in office several years, and that none of them had been re-elected within a year. On a bill of exceptions it was held that the election of the mayor was void for want of an annual election of the aldermen. But upon error to the Exchequer Chamber the judgment was reversed, and the reversal was affirmed in Parliament. The court compared it to the case of a constable or other annual officer who remains in office after the expiration of the year.¹ In an early case² it was said: "If the king create a corporation of a mayor and eight aldermen, with a clause in the charter that on the death or removal of any one of the aldermen, the mayor and the other aldermen may within eight days elect another in his place, in such a case, though no election be made within eight days, yet they may elect one at any time afterward; for the power of election is incident to the corporation, and the affirmative power to elect within eight days does not take away the power implied as incident to the corporation." But if an officer be eligible for one year only, his office will expire at the end of the year.³ Where a city charter provided that certain officers therein designated should hold their offices until others were chosen and qualified, but there was no such provision in relation to the city marshal, it was held that after the expiration of the term for which he was elected, he did not hold over until another was elected in his stead.⁴ If the charter fix the election on a day certain without any power to hold over, the election cannot be adjourned.⁵

¹ Foot v. Mayor of Truro, 2 Strange, 625. See Prowse v. Foot, 2 Bro. P. C. 282. If the term of an officer is not limited to expire at a fixed time or upon a specified event; but there is simply a direction for the annual election of the officer, his original term continues, though after the year, until

a successor is duly elected and qualified. Sparks v. Farmers' Bank, 3 Del. Ch. 274.

² Hicks v. Launceston, referred to 1 Roll. Abr. 512.

³ Regina v. Durham, 10 Modern, 146.

⁴ Beck v. Hanscom, 29 N. H. 213.

⁵ Rex v. Pole, 7 Modern, 194.

CHAPTER V.

CORPORATE MEETINGS.

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| <p>§ 59. Importance of.
60. Who to call.
61. Different kinds of meetings.
62. Rule as to notice of meeting.
63. How notice should be given.
64. Requisites of notice.
65. Rule as to meeting in the State granting charter.</p> | <p>§ 66. Organization of meeting.
67. Expression of corporate will.
68. Rule with reference to a quorum.
69. When all are required to be present.
70. Separate private action of members invalid.
71. Limitation of power of majority.</p> |
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§ 59. Importance of.—The wishes of the corporation, manifested as they must be by and through the individuals composing it, respecting its organization, internal policy, and the general conduct of its affairs, could not be very well ascertained and authoritatively expressed otherwise than at a meeting of the members held for that purpose, where would be afforded an opportunity for an interchange of views and mutual discussion. Officers must be appointed or elected, by-laws passed, and vacancies filled, not to mention the numerous other proceedings calling for united action. It has been said with reference to corporate directors that in general the governing body of a corporation as such are agents of the corporation only as a board, and not individually; that they have no authority to act except when assembled at a meeting of the board; and that the separate action individually of the persons composing such governing body is not the action of the constituted body of men clothed with corporate powers.¹

¹ Baldwin v. Canfield, 26 Minn. 43; 45 Pa. St. 386; Corn Exch. Bank v. Harrington v. Liston, 47 Iowa, 11; Cumberland Coal Co., 1 Bosw. 436; Stoystown, etc., Turnp. Co. v. Craver, Doyle v. Mizner, 42 Mich. 332. "We

Corporate meetings being therefore indispensable, it becomes necessary to consider how they may be called, at what place, and how the will of the members may be indicated so as to bind the entire body.

§ 60. **Who to call.**—It is scarcely necessary to say that special directions on the subject in a statute should in general be followed. Where a statute provided that the notice to call a meeting of the members should be signed by the secretary, or president, or other principal officer or

concur," said the court in *Edgerly v. Emerson*, 23 N. H. 555, "in the doubt suggested as to the validity of any action of a majority, or even of all of the board of directors, where there has been no meeting or consultation, each giving his assent at a different time and place from the others. We think that the learned judge who delivered the opinion in that case (*Rex v. Winwich*, 8 D. & E.), that there are safeguards in consultation, and considerations of policy as well as of construction, which, in the absence of special authority authorizing a different course, furnish an argument in favor of the position that an authority to two or more officers or agents of a corporation in their discretion to do certain acts is not well executed by the assent of all if given separately." But in *Bank of Middlebury v. Rutland, etc., R.R. Co.*, 30 Vt. 159, REDFIELD, Ch. J., in delivering the opinion of the court, said that it was not important that authority to contract in behalf of a corporation should be conferred at a meeting of the directors unless that was the usual mode of their doing such acts; that if they adopted the practice of giving a separate assent to the execution of contracts by their agents, it was of the same force as if done at a regular meeting of the board; that if this were not so, it would lead to very

great injustice, for it was notorious that the transaction of the ordinary business of railroads, banks, and similar corporations in this country was without any formal meetings or votes of the board; that there hence followed a necessity of giving effect to the acts of such corporations according to the mode in which they chose to allow them to be transacted; that if this were not done, it would become impossible to dispose of such contracts with any hope of reaching the truth and justice of the rights and duties of the several parties involved; that the cases were numerous in which the consent of a majority of the directors given separately had been held binding upon the corporation; that if it were not so held, it would enable the majority of the business corporations of the country to escape from many contracts which required the action of the directors for their execution whenever they chose to do so. See *Goulding v. Clark*, 34 N. H. 148. Although the term "the president and directors" is a convenient and very common mode of designating the board of directors in their aggregate capacity, yet it does not render the presence of the president essential unless otherwise required by the charter or by-laws. *Sargent v. Webster*, 13 Metc. 497.

clerk, it was held that one of the officers named was bound to sign the notice.¹ A religious corporation, having no by-law directing the manner in which meetings should be warned, a meeting, though called as other meetings of the society had been, was not called by a board of assessors or standing committee of the society, nor by a justice of the peace upon the application of five or more qualified voters pursuant to the statute, and a vote was passed at such meeting to sell real estate belonging to the society. It was held that a conveyance of the land was void. It was urged that as there was no by-law, a reasonable notice to the members of an intended meeting was sufficient, especially as it was in conformity with the usage of the corporation during the greater part of its existence, and that it was to be assumed as a fact, where nothing appeared to the contrary, that all the members had notice. The court said: "Though corporations, where no rule is prescribed, may act by majorities, yet before such majority can be authorized to act, all of the members should be notified. And in regard to the usage relied on in this case of notification by the clerk without by-law or direction of any committee, however that might avail as to unimportant and ordinary meetings, yet, where business of the greatest importance is to be transacted, and much of the property of the company proposed to be sold whereby the rights of third parties may be affected, we can neither presume that all of the members of the corporation were notified, nor legally infer that they ever agreed to such a mode of warning their meetings. We should rather say that such a mode

¹ Regina v. Aldham, 6 Eng. L. & Eq. 365. In Delaware, Indiana, Maine, Michigan, and Rhode Island, it is expressly declared by statute that corporations, when no other provision is specially made, may determine by their by-laws how meetings shall be

called and conducted. Rev. Code of Del. 1874, p. 376; Sts. of Ind., Eds. of 1862 and 1870, p. 268; Rev. Sts. of Me. 1871, p. 394; Comp. L. of Mich. 1871, p. 1148; Public Sts. of R. I., Ed. of 1882, p. 368, sec. 3.

of calling had crept in through inadvertence and negligence, without the sanction of a majority of the members, and is such as this court will be slow to confirm.”¹ But where the statute provided that as soon as ten per cent. of the capital stock should be subscribed, the persons named in the certificate of incorporation, or any three of them, might give notice for the stockholders to meet for the purpose of choosing directors, it was held that the statute was directory, and that it was not indispensable to the legality of the election that the notice for it should be given by the persons named in the certificate.² So, likewise, the only defect suggested in the organization of a corporation being that the call for the first meeting was signed by only one of the persons named in the act of incorporation, and not by a majority of them as required by the statute, it was held that this requirement was merely directory, and only designed to secure the rights conferred by the charter by providing an orderly method of organization.³ Where, however, a by-law provided that meetings of the stockholders should be called by the trustees, it was held that a legal meeting could not be convened by the president unless all of the stockholders consented.⁴ So, under a by-law that meetings should be called upon a petition signed by twelve proprietors at least, it was held that it could not be done by a less number than twelve.⁵ When no one is empowered by statute or by any by-law to call meetings, it may be done by the general agent of the corporation whenever he deems that the interests and business of the corporation require it.⁶ The trustees of a religious society cannot lawfully determine when the meetings shall be held,

¹ *Wiggin v. Free-Will Baptist Church*, 8 Metc. 301.

² *Chamberlain v. Painesville & Hudson R.R. Co.*, 15 Ohio St. 225. See *Citizens' Mu. Fire Ins. Co. v. Sortwell*, 8 Allen, 217.

³ *Newcomb v. Reed*, 12 Allen, 362.

⁴ *State v. Pettinelli*, 10 Nevada, 141. See *Reilly v. Oglebay*, 25 W. Va. 36.

⁵ *Evans v. Osgood*, 18 Me. 213.

⁶ *Stebbins v. Merritt*, 10 Cush. 27.

or who shall officiate, unless such power is given them by the rules and discipline of the denomination to which they belong.¹

§ 61. **Different kinds of meetings.**—These are ordinary, held at regular or stated times, for the consideration of matters in general; and extraordinary or special, called unexpectedly for the transaction of particular business.² A meeting may be ordinary as respects time and place, and extraordinary as to the business to be transacted. But although stated meetings may be special, that is, limited to particular business, yet they are usually general, that is, for the transaction of all business within the corporate powers. Unless the object of such a meeting is restricted by express provision of the by-laws, it would ordinarily be understood to be general, and so every corporator would be bound to understand it.³ The proceedings of an extraordinary meeting frequently require confirmation at some subsequent meeting.⁴

In some corporations the whole authority vests in a select body, with power to perpetuate its own corporate existence by filling vacancies. Such body constitutes the corporation itself, and the meetings and the acts done thereat are those of the corporation. There are other corporations where the aggregate body of corporators meet to discharge corporate functions, and have authority also to perform certain acts and duties by means of agents. Of this character are townships, the inhabitants of which are corporators, and appoint officers to discharge public duties under the guidance and direction of the corporation. Such, likewise, are selectmen for ordinary municipal concerns, overseers of the poor, school committees, assessors of

¹ *Am. Primitive Soc. v. Pilling*, 4 Zab. 563.

² *Brice's Ultra Vires*, by Green, 2d Am. Ed. 441.

³ *Warner v. Mower*, 11 Vt. 385.

⁴ See *Clinch v. Financial Corp.*, L. R. 5, Eq. 450; *Dean v. Bennett*, L. R. 6, Ch. 489.

taxes, and other functionaries. In the latter cases, the records of the officers are proper records of their own proceedings, but not of the proceedings of the corporation itself.¹

§ 62. Rule as to notice of meeting.—It is a general rule of law that no power or function entrusted to a body consisting of a number of persons can be legally exercised without notice to all of the members composing the body so as to give them an opportunity to participate in the proceeding;² and if the meeting be special, each member must be personally notified.³ When a regular stated time is fixed in the charter or by-laws or by usage for the election of officers or transaction of business, it will be presumed that every member has notice.⁴ It is immaterial in what way the day of the regular meetings is fixed. The only effect of a stated day is to dispense with the necessity of proving that notice of the meeting was given to the absentees. Proof that a day was fixed by common consent, is sufficient

¹ Bank of U. S. v. Dandridge, 12 Wheat. 64.

² People v. Batchelor, 22 N. Y. 128; People's Ins. Co. v. Westcott, 14 Gray, 440; Burgess v. Pue, 2 Gill, 254; Smith v. Erb, 4 Id. 437; State v. Ferguson, 31 N. J. 107; People v. Alb., etc., R.R. Co., 55 Barb. 344; s. c. 7 Abb. Pr. N. S. 265; 38 How. Pr. 228; San Buenaventura Manf. Co. v. Vassault, 50 Cal. 534. The fact that the directors of a railroad company own a majority of the stock does not obviate the necessity of submitting to the stockholders, at a meeting, a proposition to execute a lease of the road and property. Martin v. Continental, etc., R.R. Co., 14 Phila. 10.

³ Smyth v. Darley, 2 House of Lords' Cas. 789; Pike County v. Rowland, 94 Pa. St. 238. See Genesee District v. McDonald, 98 Id. 444.

⁴ Rex v. Hill, 4 B. & C. 441, 443; Rex v. Carmarthen, 1 M. & S. 702; Warner v. Mower, *supra*; State v. Bonnell, 35 Ohio St. 10. "The only meetings for which no summons is necessary, without it be expressly required by the constitution of the corporation, are the meetings for which set days are appointed by the constitution; because as every member is intended to be cognizant of the constitution of the corporation to which he belongs, he must be taken to be aware of what are the set days, and what subjects are ordained to be brought before the meetings on those days. If, however, it is proposed to transact any other business at one of the set day meetings than such as is ordained by the constitution to be transacted thereat, summons must be made as in other cases." Grant on Corp. 157.

to show notice of all of the meetings held on that day.¹ The want of notice of a meeting will be waived if the party was present at it, either in person or by proxy, and did not object to it on the ground of informality;² unless the charter requires a special notice, in which case it has been held that it cannot be omitted even by consent.³ Although certain members are not present in consequence of not receiving notice, yet if they afterward acquiesce in what was done at the meeting, they will be bound thereby.⁴ When it does not appear to the contrary, it will be presumed that notice of a meeting was given to all of the members, the burden of proof being upon those who deny the regularity of a meeting for want of due notice.⁵ Where it was provided that two-thirds of the members should assemble for the transaction of ordinary business, and the minutes simply recited that the members "after due invitation," met, it was held tantamount to saying that two-thirds met after due notice, it not having been customary to mention in the minutes the names or numbers of the members who attended.⁶ Any business which may properly be transacted

¹ Atlantic Fire Ins. Co. v. Sanders, 36 N. H. 252; Lane v. Brainerd, 30 Conn. 565.

² Rex v. Chetwynd, 7 B. & C. 695; Matter of British Sugar Refining Co., 3 K. & J. 408; 26 L. J. Ch. 369; Jones v. Milton, etc., Turnpike Co., 7 Ind. 547; Samuel v. Holliday, 1 Woolw. C. C. 400; People v. Peck, 11 Wend. 604; Stebbins v. Merritt, 10 Cush. 27.

³ Rex v. Theoderick, 8 East. 543; U. S. v. McKelden, 4 McArthur, 162.

⁴ Turquand v. Marshall, L. R. 4, Ch. 376; Smallcombe v. Evans, 3 House of Lords' Cas. 249; Bryant v. Goodnow, 5 Pick. 228. See Phosphate of Lime Co. v. Green, L. R. 7, C. P. 43; Ramsey v. Erie R.R. Co., 38 How. Pr. 193; S. C. 7 Abb. Pr. N. S. 156.

⁵ Sargent v. Webster, 13 Metc. 497.

Where a meeting of the board of directors is held and a quorum present, it will be presumed, in the absence of evidence to the contrary, that proper notice was given, and every essential thing done to constitute a valid meeting of the board. Chouteau Ins. Co. v. Holmes, 68 Mo. 601. The certificate of a majority of a school committee as to the qualifications of a teacher, is *prima facie* evidence that they notified the members who did not sign the certificate, and that they made the necessary examination. Jackson v. Hampden, 20 Me. 37.

⁶ Com. v. Woelper, 3 Serg. & Rawle, 29. And see Grays v. Turnpike Co., 4 Rand, 578; Clarke v. Imperial Gaslight, etc., Co., 4 Barn. & Adol. 315.

at a regular meeting, may, if commenced but not completed at the regular meeting, be done at an adjourned meeting, which is simply a continuation of the regular meeting; and notice need not be given to the stockholders of the holding of such adjourned meeting, whether the adjournment be from day to day, or from time to time, many days intervening.¹ But of course, in order that notice of a prior meeting should extend to one which is subsequent, the latter must be held for the same purpose and as a continuation of the first meeting.² The question being as to the validity of a tax or poor rate imposed by the vestry of a parish at an adjourned meeting, the notice of which omitted to state the purpose for which such adjourned meeting was to be held, the court said: "We are unanimously of opinion that the rate was not rendered invalid by reason of the alleged defect in the notice of the adjourned meeting. It was sufficient to give notice on the church door of the purpose for which the first meeting was to be held, and that notice having been duly given, we think that the notice so given extended to all the adjourned meetings, such adjourned meetings being held for the purpose of completing the unfinished business of the first meeting, and being in continuation of that meeting."³

¹ Warner v. Mower, 11 Vt. 385; State v. Bonnell, 35 Ohio St. 10.

² People v. Batchelor, 22 N. Y. 128; Kimball v. Marshall, 44 N. H. 466; People v. Rochester, 5 Lansing, 142. "When business that has been duly and regularly commenced at a meeting duly convened, etc., for the purpose, cannot be brought to a close at that meeting, it seems, though the point is not quite clear from doubt, that to every such meeting the power of adjournment is incident for the purpose of finishing the business so begun. . . . The power of adjournment appears to be at common law incident to

every meeting of a corporate body." Grant on Corp. 157, 358. Where the charter of a bank provides that the first meeting for the choice of officers shall be held upon a call made by commissioners appointed by the act of incorporation as soon as lawful notice of the meeting is given, the subscribers acquire rights under it, and the commissioners cannot adjourn or postpone the meeting at their pleasure. Hardenburgh v. Farmers' & Mechanics' Bank, 2 Green's Ch. 68.

³ Scadding v. Lorant, 5 Eng. L. & Eq. R. 16.

§ 63. **How notice should be given.**—When no particular mode of notifying the members is prescribed by the charter or by-laws, there should be personal written or printed notice signed by some person authorized to designate the time and place of the meeting; though a verbal notice, if all of the members thereby obtained full information of the proposed meeting, would answer every practical purpose, and would doubtless be deemed sufficient.¹ If no one has authority to call a meeting, the powers of the corporation in this respect will be suspended until a new or amended charter is obtained, unless there is a general law furnishing a remedy.² Where the act of incorporation directs the manner in which the first meeting for the choice of officers shall be convened, the corporation has an implied right to provide for the calling of subsequent meetings.³ When the statute provides that meetings shall be convened in a particular manner, the mode directed must, of course, be followed.⁴ Where the clerk of the corporation was authorized

¹ *Stow v. Wyse*, 7 Conn. 214; *Savings Bank v. Davis*, 8 Id. 191; *Bethany v. Sperry*, 10 Id. 200; *Stevens v. Eden Meeting-House Soc.*, 12 Vt. 688; *Wigin v. Free-Will Baptist Church*, 8 Metc. 301; *Evans v. Osgood*, 18 Me. 213; *Jones v. Milton, etc., Co.*, 7 Ind. 547; *Johnston v. Jones*, 23 N. J. Eq. 216. In Delaware, when not otherwise provided, the first meeting is to be called by one or more of the persons named in the act of incorporation, by publishing in a newspaper of the State a ten days' notice of the time, place, and purpose of the meeting; or, in case of a religious society, by advertisement at the front door of its usual place of worship. *Rev. Code of Del.* 1874, p. 377. In Maine, the first meeting of a corporation is to be called by a notice served on each member, or published in a newspaper of the county, if any,

otherwise in the State paper, seven days before the meeting. *Rev. Sts. of Me.* 1871, p. 393, sec. 2. In Massachusetts, the statute is similar, excepting that the notice may be published in a newspaper of an adjoining county when no paper is published in the county. *Public Sts. of Mass.* 1882, p. 566, sec. 10. In Michigan, the first meeting is to be called by a notice of twenty days to be delivered to each member, or published in a newspaper in the county or adjoining county, or in the city or district. *Comp. Laws of Mich.* 1871, vol. 1, p. 1149.

² *Goulding v. Clark*, 34 N. H. 148.

³ *Taylor v. Griswold*, 2 Green, N. J. 222.

⁴ *Bethany v. Sperry*, *supra*; *Shelby R.R. Co. v. Louisville R.R. Co.*, 12 Bush. 62.

to warn a meeting by posting up a written notice, it was held that no other mode could be given in evidence, and that it could not be proved by parol, until after proof of the loss of the notice.¹ But under a by-law requiring a meeting to be called by the president upon the application of a given number of members, it was held that the directors might issue the call without such application.² It is obvious that the medium of publication may be material as likely to be more or less effective in informing members of the proposed meeting. Thus, where notice of a meeting was required to be published in the newspaper printed at H., if a paper was printed there, otherwise in a newspaper printed at C., and it appeared that the notice was published at C., it was held insufficient, in the absence of proof, that a newspaper was not printed at H.³ The fact that a member is away from home will not excuse the want of notice. In such a case the notice should be left with some one of the member's family, or at his house, or last place of abode, if the family be absent.⁴ It is not a valid objection to the call of a meeting, that one of the stockholders, by reason of physical or mental imbecility, was incapable of receiving notice in fact; the law not looking into the capacity of the stockholders to transact business, but only regarding the capacity of the aggregate body when duly assembled.⁵ The carrying of the charter of a religious corporation around among the members, and privately obtaining their signatures, without a notice, or meeting, will not bind them.⁶ A pledgee of stock is not, for the purpose of notice of meetings, to be regarded as an owner of the stock.⁷

¹ *Stevens v. Eden Meeting House Soc.*, *supra*.

² *Citizens' Mu. Fire Ins. Co. v. Sortwell*, 8 Allen, 217. See *Farwell v. Houghton Copper Works*, 8 Fed. Rep. 66.

³ *Goulding v. Clark*, *supra*.

⁴ *Jackson v. Hampden*, 20 Me. 37.

⁵ *Stebbins v. Merritt*, 10 Cush. 27. Notice of meeting may be waived by stockholders. *Kenton Furnace, etc., Co. v. McAlpin*, 5 Fed. Rep. 737.

⁶ *Shortz v. Unangst*, 3 Watts & Serg. 45.

⁷ *McDaniels v. Flower Brook Manf. Co.*, 22 Vt. 274.

§ 64. **Requisites of notice.**—The notice should contain the date, time of day, place, and business proposed to be transacted at the meeting; though the omission from the notice of the object will not render the whole meeting irregular.¹ When there is no provision in the statute as to the length of notice, it must be given a reasonable time before the meeting.² If sent by mail, it will be presumed that the person to whom it was addressed received it.³ A statute which provides for a long notice of a meeting given to stockholders for the election of directors, should be liberally construed, as it enables them to qualify for the election, tends to promote a full attendance, and guards against contrivance and the ill effects that might result from partial representation.⁴ A provision of law that the corporation shall meet once in every year, means the year commencing the first of January, and terminating with December.⁵ Under a statute providing that the board of trustees shall be

¹ Matter of British Sugar Refining Co., 3 K. & J. 408; Graham v. Van Dieman's Land Co., 1 H. and N. 541; 26 L. J. Exch. 73; Fox's Case, L. R. 6, Ch. 176; Cleve v. Financial Corp., L. R. 16, Eq. 363. See Granger v. Original Empire Mill, etc., Co., 59 Cal. 678; Johnston v. Jones, 23 N. J. Eq. 216.

² Rex v. May, 5 Burr, 2681; Rex v. Hill, 4 B. & C. 426; Wiggin v. Free-will Baptist Church, 8 Metc. 301.

³ Covert v. Rogers, 38 Mich. 363. In this case a written notice, signed by the treasurer of the corporation, calling a meeting of the directors for June 23d, at one o'clock in the afternoon, for the transaction of important business pertaining to the finances of the corporation, was on the morning of June 20th sent by mail to one of the directors who resided at C., in Ohio. It was proved that a person could start from H., the place where the notice was mailed and where the meeting was to

be held, go to C., and get back the night of the next day. The court, in holding that sufficient time was given, said: "Corporations have power under the statute to make specific provision fixing the time and manner of giving notice of special meetings, and, if they do not avail themselves of the power thus given, but leave the entire matter to the discretion of one of their principal officers, they have no right to complain of the insufficiency of the notice given, so long as it appears that sufficient time was given to enable the parties to be present if they so desired."

⁴ Matter of Long Island R.R. Co., 19 Wend. 37. See U. S. v. McKelden, 4 McArthur, 162.

⁵ Gibson v. Barton, L. R. 10, G. B. 329. When the charter requires annual meetings for the election of directors, a by-law cannot change the time. Elkins v. Camden & Atlantic R.R. Co., 36 N. J. Eq. 467.

annually elected by the stockholders at such time and place as shall be directed by the by-laws of the company, unless all of the stockholders are actually present and consenting in person or by proxy, the annual meeting cannot be legally held until after notice has been given of time and place; and a by-law naming a day for such meeting, without specifying the hour, will not constitute a sufficient notice.¹ When a society may lawfully meet for the transaction of its business on Sunday, a member attending a meeting held on that day may then and there be served with a notice to attend the next meeting.² Regularly the notice ought to mention the place of meeting, and this is indispensable if it is proposed to meet at an unusual place.³ A writer observes that the notice should contain the time and place of meeting, "unless there be some standing rule or established custom known to all the members which fixes these, and even then it will be more advisable to issue a proper notice to remind forgetful members."⁴ A by-law having provided that a regular meeting of the directors should be held at the principal office of the company on the first Saturday in December, and that special meetings might be called by the president at any time by giving written notice of the time and place to every director, it was held that the plain inference from this was that the president was authorized to name the place as well as the time of a special meeting, and that in the exercise of his judgment he might name some other place than the prin-

¹ *San Buenaventura Manuf. Co. v. Vassault*, 50 Cal. 534. In an English case it was held on demurrer that the replication was bad, because it assumed, as a general proposition of law, that there could not be a lawful assembly for the purpose of electing a burgess without a previous notice of the purpose of the meeting given to every member of the common council; where-

as, if all of the members were present at and concurred in the election, such notice would have been unnecessary. *Rex v. Chetwynd*, 7 B. & C. 695.

² *People v. Young Men's, etc., Soc.*, 65 Barb. 357.

³ *Miller v. English*, 21 N. J. 317.

⁴ *Green's Brice's Ultra Vires*, 2d Am. ed. 440.

cipal office of the company.¹ Where the statute directed that the place of meeting should be the counting-room of the corporation, and the meeting was held at the dwelling-house of the general agent and clerk, it was held that in the absence of proof to the contrary it would be presumed that the counting-room of the company was there.² Although where a particular kind of business is always transacted on a set day, notice need not be given if that alone is to be done, yet it will be otherwise if it is intended to proceed to some other business of importance.³ When officers serve for a year, and until others are chosen, a warrant calling the annual meeting need not state that the officers are to be chosen, although a by-law provides that the warrant shall "specify the business to be transacted."⁴ A meeting of the directors of a bank in New Haven was warned by the cashier, under instructions from the president then in New York, by giving personal notice to all of the directors in New Haven that the meeting was to be for the transaction of important business, without specifying the kind of business. The notice was held sufficient for ordinary transactions, and it was held that securing a debt of the bank by mortgaging its real estate was of this description.⁵ But notice of a meeting for the transaction of important business should name the object so as to call the attention of each member to the special matters to be considered.⁶ Notice was given of a meeting of the stockholders of a company "for the purpose of considering, and, if so determined, of passing a resolution to wind up the company voluntarily." Such a resolution having been passed, it was held (reversing the decision of the Master of the

¹ Corbett v. Woodward, 5 Sawyer C. C. 403.

² McDaniels v. Flower Brook Manuf. Co., 22 Vt. 274.

³ Willcox on Corp. 42, 43.

⁴ Sampson v. Bowdoinham Steam Mill Corp., 36 Me. 78.

⁵ Savings Bank v. Davis, 8 Conn. 191.

⁶ Shelby R.R. Co. v. Louisville, etc., R.R. Co., 12 Bush. Ky. 62.

Rolls) that the resolution was invalid, the notice not showing that it was designed to propose a resolution that the company was unable by reason of its liabilities to continue its business, nor contain anything to show that it was proposed to pass such a resolution for winding up the company as would not require confirmation by a subsequent meeting.¹ In the call for a meeting in which new directors were chosen, there was no intimation of a purpose to hold such an election. The notice was of a meeting for the purpose of making alterations in the by-laws, and for the transaction of such business as might come before them. It was held that the notice did not fairly embrace a measure of such importance to the members of the corporation as the transferring of the corporate power to new hands.² The notice of a meeting of a school district need not be drawn with special formality. All that is required is that it shall be so expressed that the inhabitants of the district may fairly understand the object for which they are to be convened.³

§ 65. Rule as to meeting in the State granting charter.—Corporations cannot migrate from one sovereignty into another so as to become legal local existences within the latter.⁴ Consequently corporate acts performed by the body of the corporation while sitting out of the State which creates it are wholly void.⁵ As a corporation exists by force of its domicile, it is obvious that where that law

¹ Matter of Bridport Old Brewery Co., L. R. 2, Ch. 191. See Matter of Silkstone Fall Colliery Co., L. R. 1, Ch. D. 38.

² People's Mu. Ins. Co. v. Westcott, 14 Gray, 440.

³ South School Dist. v. Blakeslee, 13 Conn. 227; Merritt v. Farris, 23 Ill. 303.

⁴ Wright v. Bundy, 11 Ind. 404.

⁵ Freeman v. Machias Water Power & Mill Co., 38 Me. 343; Aspinwall v.

Ohio & Miss. R.R. Co., 20 Ind. 497; Wood & Hydraulic Hose Mining Co. v. King, 45 Ga. 34; Franco-Texan Land Co. v. Laigle, 59 Texas, 339; Smith v. Silver Valley Mining Co., 64 Md. 85; Plimpton v. Bigelow, 93 N. Y. 592; Reichwald v. Commercial Hotel Co., 106 Ill. 439; Camp v. Byrne, 41 Mo. 525. See Copp v. Lamb, 12 Me. 312; Heath v. Silverthorn, etc., Co., 39 Wis. 146.

is not obligatory, the corporation can have no existence.¹ The charter of a corporation created by the Legislature of Vermont authorized the sale of shares when the owner of them neglected or refused to pay an assessment duly laid thereon. A. and B., being owners of shares which were issued as fully paid, the stockholders, at a meeting held in the city of New York, at which A. and B. were not present, passed a resolution authorizing the assessment of the stock to pay debts, and to raise funds to defray current expenses, and the sale of the shares of such owners as refused or neglected to pay the assessment. A. and B. had notice of the meeting and of the assessment, but did nothing to assert their rights, and their shares were sold. It was held that no corporate act could be done out of the jurisdiction creating the corporation which would bind members not participating in it, and that the mere neglect of A. and B. to take action for a time short of that prescribed by the statute of limitations would not preclude them from maintaining an action for damages.² When a corporation is created by the concurrent legislation of two States, it may hold its meetings in either.³ There is a wide difference between a corporation, as such, holding meet-

¹ *Hilles v. Parish*, 14 N. J. Eq. (1 McCarter) 380; *Wright v. Bundy*, *supra*. The same principle is applied in analogous cases to persons upon whom the law has conferred some power or faculty which, as natural persons, they do not possess; as, for instance, the power conferred by law upon executors, administrators, and guardians. It is no objection to the corporate acts of a foreign corporation that they are authorized by a meeting of the directors held in the State, when the acts thus authorized are not repugnant to the policy of the laws of the State. *Smith v. Alvord*, 63 Barb. 415.

² *Ormsby v. Vt. Copper Mining Co.*, 56 N. Y. 623, reversing s. c. 65 Barb. 360. And see *Mitchell v. same*, 40 N. Y. Supr. Ct. 406.

³ *Covington, etc., Bridge Co. v. Mayer*, 31 Ohio St. 317, approving *Sebastian v. Covington, etc., Bridge Co.*, 21 Ib. 451. Where the resolutions of the board of directors of a corporation authorizing the transfer of stock were passed at a meeting held out of the State, it was held that they were void, and that the transfer of stock in pursuance of such resolutions to the directors who participated in the illegal proceedings vested no title in them. *Hilles v. Parish*, *supra*.

ings, passing votes, and exercising corporate powers outside the boundaries of its creation, and the making of a contract outside of the State by the persons intrusted with the management of the affairs of such corporation; such persons not being the corporation, but its mere agents. In the latter case, the courts allow actions to be sustained by and against a foreign corporation the same as in the case of a corporation created by their own legislature.¹ This rule applies to the directors of a corporation, who are not a corporate body when acting as a board, but a board of officers or agents.² The directors of a corporation, in conferring authority upon an agent to execute a deed, do not act as a corporation, but as agents of the corporation; and this authority may be conferred by a vote passed at a meeting of the directors without the State where the corporation was created.³ It is, therefore, not a valid objection to a mortgage, given by a railroad company to secure its bonds, that the meeting of the directors by which the mortgage was authorized was held out of the State; it being admitted that the mortgage was executed properly and in good faith, and duly recorded in the office of registry in the State in which the company was incorporated and had its railroad.⁴ Upon a writ of entry for a tract of land to which the demandants derived their title from a company incorporated by the Legislature of Maine, it appeared that a meeting was called for the organization of the corporation to assemble in the city of New York; that the charter was there accepted and the officers chosen; and that at a meeting of directors, thus elected, in New York, a resolution was passed authorizing the president and secretary to execute the conveyance

¹ Bank of Augusta v. Earle, 13 Pet. 521.

² Galveston R.R. v. Cowdrey, 11 Wall. 476; Wright v. Bundy, *supra*; Newburg Petroleum Co. v. Weare, 27 Ohio St. 343; McCall v. Byram Manf.

Co., 6 Conn. 428; Reichwald v. Com. Hotel Co., 106 Ill. 439; Bassett v. Mining Co., 15 Nevada, 293.

³ Bellows v. Todd, 39 Iowa, 209.

⁴ Galveston R.R. v. Cowdrey, *supra*. And see Arms v. Conant, 36 Vt. 744.

under which the demandants claimed title. It did not appear that there had ever been a meeting in Maine, though the company had an agent in that State. It was held that the conveyance was void, on the ground that the election of the directors took place out of the State. It was conceded that if the company had been legally organized, and the directors legally elected, the fact that they made the appointment of the agent out of the State would not have rendered the conveyance invalid.¹

§ 66. **Organization of meeting.**—A meeting should be opened and called to order within a reasonable time of that specified in the notice. What is a reasonable time will depend in some measure upon the circumstances of each case. A delay will be proper when it is necessary to enable all of the members to assemble; but not such a delay as to create a general belief that no meeting will be held, and thereby to induce the larger part of the members to disperse, where a few afterward open the meeting, and adopt a measure which could not have been done except for the delay.² Part of the members of a corporation assembled a quarter of an hour before the time appointed for an election, organized a meeting, chose inspectors, and passed resolutions to proceed with the election, which they did, after confirming the choice of inspectors. Other members in a different room, at or shortly after the hour fixed, organized a meeting, appointed inspectors, and also had an election. It was held

¹ *Miller v. Ewer*, 27 Me. 509. Where a call for payment upon the subscription to the stock of a corporation was ordered by a board of directors, chosen at a meeting held beyond the boundaries of the State granting the charter, it was held that a subscriber in an action against him for the call thus made could not object to the legality of the election; objection to the authority of directors *de facto* to act in behalf of

the corporation not being available in a collateral suit, without showing a judgment of ouster against them in a direct proceeding by the government for that purpose. *Ohio & Miss. R.R. Co. v. McPherson*, 35 Mo. 13, *BATES*, J., dissenting. See *Franco-Texan Land Co. v. Laigle*, 59 Texas, 339.

² *South School Dist. v. Blakeslee*, 13 Conn. 227. See *State v. Bonnell*, 35 Ohio St. 10.

that the first-named meeting was irregular and void as to the members who did not participate in it, and that the irregularity was not cured by reorganizing the meeting at the proper time, it being in fact and legal effect a continuation of the first meeting; but that the second meeting was valid.¹ The presumption of law is, that the meeting was held at a suitable time in the day, and in pursuance of the notice.² A moderator who, in the absence of the president or other regular presiding officer, merely presides, and sees that the proceedings are conducted in a legal and orderly manner, acts only as an agent of the corporation. It is not necessary that he should be a stockholder, although, for convenience, it is customary to choose one of the stockholders to perform the duty. But the moderator's duties, like those of clerk, are simply ministerial, and can in no way affect the validity of the transactions of the corporation or the rights of others.³ When the statute does not require that the subject matter of business to be transacted at a meeting shall be named in the notice, the meeting may entertain and pass upon anything essential to the corporate interests.⁴ But it has been held that if the members of a corporation are summoned to appear for one particular purpose, they cannot proceed to the consideration of any other matter, without the consent of the whole body.⁵

§ 67. **Expression of corporate will.**—Corporations are subject to the principle that the members are bound by the acts of the majority when such acts are conformable to the charter; each one having tacitly agreed to subordinate his individual will to the will of the corporate body duly ascertained according to law.⁶ The majority here means the

¹ *People v. Alb., etc., RR. Co.*, 55 Barb. 344.

² *South School Dist. v. Blakeslee*, *supra*.

³ *Stebbins v. Merritt*, 10 Cush. 27.

⁴ *Schoff v. Bloomfield*, 8 Vt. 472.

⁵ *Machel v. Nevins*, 11 East. 84.

⁶ *Durfee v. Old Colony, etc., R.R. Co.*, 5 Allen, 242; *State v. Wilmington*, 3 Harring. Del. 294; *Faulds v. Yates*,

major part of those who are present at a regular corporate meeting. The following is the language of a few of the authorities on the subject: "The will of a corporation is not merely the concurring will of all its members, but that of even a bare majority of them. Therefore, the will of a bare majority of all its existing members is regarded as having the disposal of, and being invested with, all the rights of the corporation. This rule is founded on the law of nature, inasmuch as if unanimity were demanded, it would be quite impossible for any corporation to will and to act. It is also confirmed by the Roman law."¹ "In general, it would be the understanding of a plain man, that when a body of persons is to do an act, a majority of that body would bind the rest."² "The act of the majority binds the whole, so much so, that the court will compel the person who has the custody of the corporate seal to affix it to any act according to the vote of the majority, though against the consent of such person."³ "The fundamental principle of every association for the purposes of self-government, is, that no one shall be bound except with his own consent expressed by himself or his representatives. But actual assent is immaterial, the assent of the majority being the assent of all; and this is not only constructively, but actually true; for that the will of the majority shall in all cases be taken for the will of the whole, is an implied,

57 Ill. 416; *Dudley v. Ky. High School*, 9 Bush. 576; *Mowrey v. Ind. & Cin. R.R. Co.*, 4 Biss. 78; *Neate v. Denman*, L. R. 18, Eq. 127; *Treadwell v. Salisbury R.R. Co.*, 7 Gray, 393; *Gifford v. N. J. R.R. Co.*, 10 N. J. Eq. 174; *New Orleans, etc., R.R. Co. v. Harris*, 27 Miss. 537; *Eggleston v. Doolittle*, 33 Conn. 396; *Howell v. Chicago & N. W. R.R. Co.*, 51 Barb. 378; *Rogers v. Lafayette Agricultural Works*, 52 Ind. 304. In the case of towns, the power of the majority over

the minority is limited by law to such cases as are clearly provided for and defined by the statute which prescribes the powers of these corporations. *Stetson v. Kempton*, 13 Mass. 272.

¹ Savigny's *System of the Roman Law*, vol. 2, p. 329, sec. 97.

² LAWRENCE, J., in *Withnell v. Gartham*, 6 Term R. 388.

³ KENYON, C. J., in *Rex v. Beeston*, 3 Term R. 592. See case of *Wadham College*, Cowp. 377.

but essential stipulation in every compact of the sort ; so that the individual who becomes a member assents beforehand to all measures that shall be sanctioned by a majority of the voices."¹ "Religious societies, acting as corporate bodies under the statute, must be governed by majorities, and minorities must submit or secede. . . . In the regulation of the temporal concerns of the society, I know of no exception where the minority must not yield to the majority acting within the scope of their authority, and proceeding according to law. It must be so in the nature of things, else, upon any change of affairs in a church, a very small minority would have power to turn out a very large majority."²

It is scarcely necessary to say that it makes no difference what may be the nature of the corporation, whether for public or private, religious or secular purposes, contracts entered into and arrangements made or sanctioned by a majority of the members, with due regard to formalities, if the questions be such as the general body is competent to determine are valid, notwithstanding the opposition or dissent of some of the corporators. And it forms no legal ground of complaint that some resolution or regulation of the company, which existed at the time a person became a member, and upon faith in the continuance of which he was induced to subscribe for stock, was afterward changed ; it being the right and duty of the majority to make such change when demanded by the interests of the company.³

¹ GIBSON, J., in *St. Mary's Church*, 7 Serg. & Rawle, 517.

² RANDOLPH, J., in *Miller v. English*, 1 Zab. 317. Where land becomes the absolute property of a religious corporation, subject to no use except for its general purposes, it is incident to its nature to hold such property at the will of the majority, if the act of incorpora-

tion does not otherwise provide. The majority would not be permitted to exclude their fellow-corporators. But they may occupy and manage the property as they please, admitting the minority to the same benefits as themselves. *Keyser v. Stansifer*, 6 Ohio, 363.

³ See Green's *Brice's Ultra Vires*, 2d ed., 663 *et seq.*, and cases there cited.

In an action to recover the amount of subscription to the stock of a railroad company, it appeared that when the defendant subscribed for the stock, and previous thereto, an agent of the company stated in a public address, and also privately to the defendant, that all of the stockholders should have a direct vote in the location of the road, and that the defendant subscribed on that express condition, and refused to do so until this assurance was given; that different routes had been contemplated, and there was a deep interest and feeling in the community on the subject; but that afterward, at a meeting of the stockholders, it was resolved by a large majority that the location of the road should be made by the president and directors of the company, on the route selected by the engineer. It was held that the foregoing did not constitute a defense.¹ The strictness with which courts adhere to the principle that the will of the majority is the will of the corporation, was illustrated in a case where a bill in equity having been filed for relief against what was alleged to be a fraud committed by certain of the directors of an incorporated company in the sale to themselves, as representatives of the company, of lands in which they were personally interested, Vice-Chancellor WIGRAM declined to interfere, saying that while the court might be declaring the acts complained of void at the suit of the plaintiffs, a majority of the members might at a

¹ East Tenn. & Va. R.R. Co. v. Gammon, 5 Sneed, 367. Blackstone (vol. 1, p. 478) says: "With us *any* majority is sufficient to determine the act of the whole body. And whereas, notwithstanding the law stood thus, some founders of corporations had made statutes in derogation of the common law, making very frequently the unanimous assent of the society to be necessary to any corporate act, which King Henry VIII. found to be a great obstruction to his projected scheme of

obtaining a surrender of the lands of ecclesiastical corporations, it was therefore enacted, by statute 33 Hen. VIII., ch. 27, that all private statutes shall be utterly void whereby any grant or election made by the head, with the concurrence of the major part of the body, is liable to be obstructed by any one or more, being the minority; but this statute extends not to any negative or necessary voice given by the founder to the head of any such society."

meeting confirm the sale.¹ The rule that the acts of the majority are binding on the whole is to be understood as confined to a majority of those who, by the constitution of the corporation, have a voice in the corporate deliberations. For it frequently happens that the power of action does not extend to the corporation at large, but is confined to a select body; and then the act of the majority of that select body binds not only the whole of the select body, but the whole corporation.²

§ 68. Rule with reference to a quorum.—There is a distinction between a corporate act to be done by a select and definite body, as by a board of directors, and one to be performed by an indefinite number. In the latter case, a majority of those who appear, if all be properly summoned, may act, however small the number, it being presumed that those who do not appear mean to abide by whatever is done.³ But to constitute a quorum of a select and definite

¹ *Foss v. Harbottle*, 2 Hare, 461.

² 1 Kyd on Corp. 308, 309. "In different corporations, too, the manner in which the majority shall be reckoned, varies according to the provisions of the constitution. Sometimes the act that is to bind the corporation must be sanctioned by the assent of an absolute majority of the whole body empowered to act; sometimes it is sufficient if a majority of the whole body be assembled, and the majority of those assembled agree to the act; and sometimes a majority of those assembled, whether those assembled be a majority of the whole or not, may bind the whole corporate body. In all those several cases, the act of the major part which is to bind the rest, must be done at one and the same time, and at a regular meeting held for that purpose." Ibid.

³ *Field v. Field*, 9 Wend. 394; *Madison Avenue Baptist Church v. Baptist*

Church in Oliver Street, 5 Robt. 649; *Sargent v. Webster*, 13 Metc. 497. The provision of the constitution of Minnesota, sec 1, art. 11, declaring that all laws for removing the county seat should, before taking effect, be submitted to the electors of the county to be affected thereby, and be adopted by a majority of such electors, was held to mean, not a majority of the actual electors of the county, but a majority of the electors voting. *Taylor v. Taylor*, 10 Minn. 107; *Bayard v. Klinge*, 16 Ib. 249; *Everett v. Smith*, 22 Ib. 53. See *Craig v. First Presbyterian Church*, 88 Pa. St. 42. A minority of the members of an unincorporated religious society, owing to dissensions in the society, discontinued their attendance at the church, and held their religious exercises at the house of R.; the society thus maintaining services in two places with separate ministers, but

body of persons, a majority at least must be present, and then a majority of the quorum may decide. By an act for draining a particular district, commissioners were authorized to assess and tax upon the whole district such sums as should be necessary for carrying into effect the objects of the act, and to elect assessors to apportion such sums of money among the several parishes, townships, and places within the district. The commissioners having appointed three assessors, the three met to agree upon an apportionment. Two out of the three agreed, but the third did not concur. It was held that the apportionment thus made was valid. Lord TENTERDEN, after consulting with the other judges, said: "Perhaps it may not be necessary that all should meet; certainly a majority must meet. In this case all the three had met. Where it is granted by charter that a corporation shall have so many aldermen, and so many capital burgesses, and that when one of the latter shall die, depart, or be removed, another shall be elected in his place by the mayor and aldermen and other capital burgesses then surviving or remaining, or the greater part of them, the election must be made by a majority of the full numbers of aldermen and of capital burgesses; a mere majority of members of both bodies who happened to survive is not sufficient."¹ In another case, LITLEDALE, J., said: "It is a

neither excluded from participating in the services of the other. Afterward the minority gave the requisite notices for a meeting to organize a corporation, which were read in the church and at the house of R., and the meeting was duly held, and the necessary legal formalities observed to incorporate the society. The trustees of the corporation thus formed took possession of the church edifice, and while holding religious services were compelled by the majority to withdraw from it, the latter continuing to assert their right, and to

exclude the former. In an action of ejectment by the minority to recover possession of the church property, it was held that they were vested with all of the temporalities of the society; though since, at future elections all of the members might participate in a contest for trustees, the majority would then of course prevail. *Trustees v. Bly*, 73 N. Y. 323.

¹ *Rex v. Whitaker*, 9 Barn. & Cress. 648. See *Palmer v. Doney*, 2 Johns. Cas. 346.

well-established rule, that in order to constitute a good corporate assembly in the case of a corporation consisting of a definite and indefinite body, there must be present a majority of that number of which the definite body consists, although it is not necessary that there should be a majority of the indefinite body. Now, a select vestry is a definite body, consisting of persons having a special public trust reposed in them. They, therefore, resemble in their functions a definite body in a corporation." It was said by the court in an English case that "the rule laid down that a majority of a definite body must be present to constitute a good corporate assembly, is one deduced by construction from the terms of the charter and the presumed intention of the grantor. It may, however, be fairly supposed that the king would grant to corporate bodies powers consistent with the general rules of law. There may be two objects in appointing a select vestry: one may be to prevent tumultuous meetings which might otherwise occur in populous parishes if the whole body of the parishioners were called upon to meet; another may be that in all cases there should be a sufficient number of persons to execute the duties reposed in the vestry. The latter object can only be attained by requiring that some specific number of the select vestrymen should be present to constitute a good assembly. The statute of 58 Geo. 3d, ch. 45, sec. 60, has in one instance required the concurrence of four-fifths of the select vestrymen, but in other cases it does not in terms require any specific number. I am of opinion that in analogy to corporations and other cases where public in contradistinction to private trusts are to be executed by definite bodies there ought, to constitute a good assembly of a select vestry, to be present a majority in number of the persons who constitute the select vestry."¹ Where there were but two out of nine di-

¹ *Blacket v. Blizard*, 9 Barn. & Cress. 851.

rectors composing the board present, the election was set aside on that ground.¹ As a body corporate can only act in the mode prescribed by the law creating it, when it is expressly provided that no meeting shall have the power of acting at which a certain number shall not be present, the special provision of course governs and must be followed. Where the charter of an insurance company provided that no money or losses should be paid unless with the approbation of at least four of the directors with the president and his assistants, or a majority of them who had met for that purpose, it was held that an adjustment of losses not made at a board of directors constituted according to the act of incorporation would not be binding on the corporation.² In Connecticut the charter of a railroad company provided that four directors should be present to constitute a quorum for the transaction of business. Subsequently the company was united with a company chartered in Rhode Island under authority from the legislatures of the two States, the new company taking the name of the company originally chartered in Connecticut. The Rhode Island charter made no provision as to the number of directors that should constitute a quorum. But by the agreement of the two companies, which was sanctioned and confirmed by a statute of the last-named State, the Rhode Island company was to "surrender its franchises, powers, and privileges" to the Connecticut company, and the Legislature of Connecticut, by an act confirming the union, expressly preserved to the united company all the powers, rights, privileges, and franchises which had been granted to the original company. It was held that four directors only continued to constitute a quorum.³ In England,

¹ Willcocks, *ex parte*, 7 Cowen, 402. 109. See Rogers, *ex parte*, 7 Cowen, 531 *et seq.*, note.
And see Price v. Grand Rapids, etc., R.R. Co., 13 Ind. 58.

³ Lane v. Brainerd, 30 Conn. 565.

² Beatty v. Marine Ins. Co., 2 Johns.

where the articles of association did not prescribe the number of directors required to make a quorum, it was held constituted by the number who usually acted in conducting the business of the company. Lord ROMILLY, M.R., said: "I have considered very carefully the question whether two directors were a sufficient quorum for the purpose of forfeiting the shares. The total number of directors was six. The largest number who attended was four, and the usual number who attended was two; that is to say, a third of the directors, and most of the acts were done by that number of directors. Then I find that, though the articles of association specify certain cases in which a committee may form a quorum, they nowhere specify what number shall form a quorum of directors. It is suggested that in the absence of any stipulation to that effect it requires the total number to be present. But I do not think that that follows. I think that what follows is this: that it is the duty of the court to find out what was the usual number of directors who conducted the business of the company. I find the usual number was two, and that being so, in order to prove that the forfeiture was invalid, it is necessary to establish that it was a wrong and improper exercise of their functions."¹ It has been held that when the corporation is composed of several distinct parts or classes of persons, every integral part must be represented at a corporate meeting by a majority at least of its proper members, though the major part of all present when assembled are competent to do a corporate act.² But this rule is only applicable where each integral part is composed of a definite number. If one of them be

¹ L. R. 4, Eq. 233. *Lyster's Case*.

² *In re St. Mary's Church*, 7 Serg. & Rawle, 517. Grant (Corp. 68) says: "Various questions have arisen in former times as to what is a legal assembly of a corporate body consisting of several definite parts; but these ques-

tions being now of minor importance, it will suffice to refer briefly to the cases in which they have arisen, observing that the general rule with reference to corporate bodies consisting of different integral parts of a specified number of members is, that where the

indefinite, it is sufficient if any of the persons composing it are present.¹

§ 69. When all are required to be present.—If it be provided by statute that every member shall participate in the deliberations and determination of matters properly before them, all must be present at the consummation of any act; and it will not be an excuse that one who was present when

act is to be done by the body for the time being, or the major part of them, the majority of the whole must meet for the purpose." Referring to *Rex v. Miller*, 6 Term Rep. 268; *Rex v. Bellringer*, 4 Id. 810; *Rex v. Bower*, 1 B. & C. 497; *Rex v. Headley*, 7 Id. 496; *Rex v. Great*, 8 Id. 363; *Rex v. May*, 4 B. & Ad. 843. Where the charter created two bailiffs and twelve assistants, and enacted in effect that the two and the twelve for the time being, or the greater part of them, of whom the bailiffs should be two, might do corporate acts, it was held that a meeting at which two bailiffs and six assistants were present, was not a good meeting to do a corporate act. *Bailiffs of Godmanchester v. Phillips*, 4 A. & E. 550. A charter provided that the city government should be vested in a mayor, one council of seven to be denominated the board of aldermen, and one council of twenty-one to be called the common council, which boards should in their joint capacity constitute the city council, and that a majority of each board should constitute a quorum for the transaction of business. The board of aldermen designated by vote the 12th of June as the time for going into convention for the choice of city officers, which was concurred in by the common council. When, however, the city council met, only a minority of aldermen appeared. It was held that as the preliminary step had been properly taken the mere neglect of one of the constit-

uent bodies to carry its vote into effect did not hinder the city council from proceeding with the election of officers. *Beck v. Hanscome*, 29 N. H. 213. In *Whiteside v. People*, 26 Wend. 634, appointment to office was vested in two bodies, each of which was separately to assemble and make a nomination. Both bodies were then to meet, and, if the nominators agreed, the person nominated was to be appointed, but if not, there was to be an election by joint ballot. The two bodies met, and one of them declared it had made a nomination; but the other made none, refused to act, and left the meeting. It was held that the appointment of the officer by a majority of the whole number of both bodies was valid. In *Humphrey, ex parte*, 10 Wend. 612, the judges of the Court of Common Pleas and the supervisors were separately to nominate superintendents of the poor, and then to meet for the purpose of comparing the nominations, and, if they disagreed, they were to elect by joint ballot from the persons nominated. The supervisors met, but refused to make a nomination. The two bodies then met, and a majority of the whole number, in joint meeting, elected superintendents by ballot, and it was held that the election was valid, the court remarking that it could not be in the power of one board thus to violate their duty.

¹ *Rex v. Whitaker*, 9 B. & C. 648.

the act was begun, left wrongfully before its conclusion.¹ When an officer who, under the charter, is an integral part of the corporation, leaves the meeting after it has been regularly convened and the election entered upon, but before it has been completed, the election thus held is void.² There are many cases where authority is granted to a board, or to several persons or a majority of them, or to a certain limited number either more or less than a majority, who are thereby constituted a quorum. Thus, in the usual form of bank charters there is a provision that not less than four directors shall make a board for the transaction of business. The effect of this clause is the same as a provision that the directors, or any four of them, shall be competent to transact any business of the bank; and four, when assembled, possess all the powers of the entire board.³ Designating the board of directors as the "president and directors," does not render the presence of the president indispensable to a meeting, unless required by the charter or by-laws.⁴

§ 70. **Separate private action of members invalid.**—When the charter provides that corporate functions shall be exercised by a select class or body, it must meet as a board, so that it may hear the views of each, and deliberate. The separate action of the individuals composing it without consultation, although a majority of them should in this way agree upon a certain measure, would not be sufficient. Nor would their action in a meeting of the whole body of corporators be a valid corporate proceeding. In thus acting they are not distinguishable from their associates, and their decision is united with that of others who have no proper or legal right to join with them in its exercise. All proper responsibility is lost. The result may be the same

¹ *Palmer v. Doney*, 2 Johns. Cas. 346; *Rogers, ex parte*, 7 Cowen, 526.

² *Rex v. Buller*, 8 East. 389; *Rex v. Williams*, 2 Maule & Selw. 141.

³ *Edgerly v. Emerson*, 3 Foster (23 N. H.), 555.

⁴ *Sargent v. Webster*, 13 Metc. 497.

that it would have been if they had met separately, and it may be different. In the general assemblage, influences may be brought to bear upon them which in their proper board would be unheeded; and no one can say with certainty that their vote in the latter would have been the same.¹ Where the directors were authorized with the consent of a majority at a meeting of the subscribers, to amalgamate the undertaking with another similar one, and a majority of the subscribers consented to the amalgamation, but no meeting was called, it was held that the amalgamation was not binding on those who had not assented to it.² The prescribed quorum of directors in a railroad company being three, the secretary affixed the seal of the company to a bond, with the written consent of two directors obtained at a private interview, and the verbal authority of a third obtained in the same way. In an action against the company on this bond, it was held that the defendant was not liable.³ But, on the other hand, it is not necessary that the whole board should consult and pass upon every trifling detail of business, which would be very inconvenient and often detrimental. In this country numerous transactions of railroad companies, banks, and similar corporations are conducted without any formal meeting.⁴

§ 71. **Limitation of power of majority.**—It is an implied and essential stipulation of every association formed for the prosecution of a private enterprise that no one shall be bound except with his own consent expressed by himself or his representatives, and that the acts of a majority of the body are binding on the whole only when confined to its ordinary transactions and consistent with the original

¹ Cammeyer v. United German Lutheran Churches, 2 Sandf. Ch. 186; Dispatch Line, etc., v. Bellamy Manf. Co., 12 N. H. 205; Ross v. Crockett, 14 La. Ann. 811. See *ante*, sec. 59.

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² Johnson, *ex parte*, 31 Eng. L. & Eq. 430.

³ D'Arcy v. Tamar, etc., R.R. Co., L. R. 2, Ex. 158.

⁴ Bank of Middlebury v. Rutland, etc., R.R. Co., 30 Vt. 159; Bradstreet v. Bank of Royalton, 42 Id. 128.

objects of its formation.¹ The principle that the minority are bound by the acts of the majority when those acts are within the charter, and not inconsistent with the object of the corporation, does not apply to acts of the majority inconsistent with the continued existence of the corporation and the purpose for which it was organized; and a stockholder does not consent to such acts by becoming a member. No majority, however large, can compel an individual stockholder to submit to a material change in the powers and purposes of the corporation not in aid of the original object, such an attempted exercise of power, even if sanctioned by the legislature, being an attempt to destroy one private contract and to compulsorily create another in its stead.² In *Matter of Phoenix Life Ass. Co.*³ the company had been established for granting insurances on lives, and at an extraordinary general meeting it was resolved to extend the business to marine insurance. A supplemental deed, professing to confirm this extension of business, was executed by several of the shareholders; and in the annual return to the joint stock companies' registry office, the extension was notified. The reports of the directors several times alluded to the extension, and on one occasion such a report accompanied the dividend warrant. The business as extended was carried on a year and a half, when the company was ordered to be wound up. The vice-chancellor, in holding that these circumstances were not sufficient to bind the general body of shareholders by acquiescence to

¹ *In re St. Mary's Church*, 7 Serg. & Rawle, 543; *Mowrey v. Ind. & Cin. R.R. Co.*, 4 Biss. 78.

² *Zabriskie v. Hackensack & N. Y. R.R. Co.*, 18 N. J. Eq. (3 C. E. Green) 178; *Black v. Delaware, etc., Canal Co.*, 22 N. J. Eq. (7 C. E. Green) 130; *s. c.* 24 N. J. Eq. (9 C. E. Green) 455; *Middlesex Turnp. Co. v. Locke*, 8 Mass. 298; *Sprague v. Ill. R.R. Co.*, 19 Ill.

177; *McCrary v. Junction R.R. Co.*, 9 Ind. 358; *Winter v. Muscogee R.R. Co.*, 11 G. A. 438; *Central R.R. Co. v. Collins*, 40 Id. 617; *Hartford & New Haven R.R. Co. v. Croswell*, 5 Hill, 383; *Clearwater v. Meredith*, 1 Wall. 25.

³ 2 J. & H. 441; 31 L. J. Ch. 479, cited in *Brice's Ultra Vires*, 2d Am. Ed. 85.

the extension which could be effected only by a new deed, executed by all, said: "I need not refer to the cases that show that you cannot bind a single dissentient shareholder to any purpose which is not the original purpose of the company; and that if there was a single dissentient shareholder, it would be quite sufficient for the official manager, appearing for all the shareholders, to say that no such claim could be supported against the company." An act which compels a corporation to change its business is no less invalid and repugnant to its charter than an act that directly makes the change.¹ In a comparatively recent case the court laid down the following propositions: "1st. As a general rule the acts of a majority of a corporation are binding on the whole when confined to ordinary transactions and consistent with the original objects of its formation; 2d. In all cases where, at the time of subscribing for stock in a corporation, there are existing laws by which the charter of such corporation may be fundamentally changed, the subscription must be presumed to have been made with a view to such laws and to changes which may possibly be made conformably to them, and in such case a majority of the stockholders may adopt changes against the will of a minority; 3d. In cases not falling within the proposition last above stated, no fundamental change, even though authorized by subsequent legislation, can be made in the charter of a private corporation without the consent of all the stockholders, unless the legislature has provided otherwise in the charter."² In a case in Massachusetts it was claimed, as a principal ground of demurrer to a bill in equity against directors, that, conceding that a railroad company entered into a conspiracy to defraud a minority of the stockholders, and so dealt and managed as to destroy

¹ *Abbott v. Am. Hard Rubber Co.*, 33 Barb. 578. And see *Dyckman v. Detroit & Milwaukee R.R. Co.*, 8 Mich. 100.

Valiente, 43 Id. 131; *M'Laughlin v.* ² *Mowrey v. Ind. & Cin. R.R. Co.*, 4 Biss. 78, per McDONALD, J.

the value of the stock, yet the only relief which the minority had was to sell their stock. This doctrine was said to result from the nature of corporate property which, being owned by the corporation, was under the absolute control of a majority of the stockholders, and that their decisions and acts were final. It was held, however, that the objection was untenable.¹

Any stockholder may have an injunction against the other corporators to restrain a fundamental change in the original purpose of the act of incorporation, though the proposed change be authorized by an act of the legislature; the relation between a stockholder and the corporation being one of contract which cannot be impaired without a violation of the Constitution of the United States.² If, where the charter had made no provision on the subject, the legislature could confer upon the owners of a majority of the stock of a corporation power to accept proposed amendments to the charter, and by such acceptance to bind the remainder of the stockholders, the charter might be altered in its most essential stipulations, not only without the approval, but against the consent of a large number of the corporators, and they thus be subjected to duties and responsibilities not imposed by their contract with the corporation. A majority of the stockholders of a corporation cannot, at their own mere caprice, sell out the whole source of their emoluments, and invest their capital in other enterprises contrary to the wishes of the minority. When the duration of the business is fixed by the charter, until the time has expired, it must continue. If no period be designated by the charter

¹ Peabody v. Flint, 6 Allen, 52. See 46; Laumon v. Lebanon Valley R.R. Co., 30 Pa. St. 42; New Orleans, etc., R.R. Co. v. Harris, 27 Miss. 517; Curtiss v. Manchester & Bolton Canal Co., 13 Eng. Ch. 131; Ware v. Grand Junction Water Co., 2 Russ. & Mylne, 461; Stevens v. Rutland & Burlington R.R. Co., 1 Am. Law Reg. 154.

² Stevens v. Rutland & Burlington R.R. Co., 29 Vt. 545; Sparrow v. Evansville, etc., R.R. Co., 7 Ind. 369; McCrary v. Junction R.R. Co., 9 Id. 358. And see State v. Bailey, 16 Ib.

at which the proposed use of the capital shall cease, the contract between the parties is, that so long as the affairs of the company are prosperous, it shall go on, unless all consent to the contrary.¹ An injunction was granted, on the application of a member of a company, organized for the purpose of carrying on the business of fire and life insurance, restraining the company from also embarking, as they proposed to do, in marine insurance, although the plaintiff had only paid one hundred and fifty pounds to the funds, and the whole capital was five hundred thousand pounds, divided among more than six hundred stockholders; notwithstanding the defendants had offered to return all that the complainant had paid, with interest, and to fully indemnify him against loss by the transactions of the company in the business which was beyond the original articles. Lord ELDON stated, in substance, that it was not competent for any number of persons, in a company formed for specified purposes, to affect that formation, by calling upon some of the members to receive back the capital stock and interest, and quit the concern; which, in effect, would be compelling them to retire upon such terms as should be dictated to them, so as to form a new company.² In another case, an injunction was granted on the application of a single shareholder, restraining the corporation from employing its funds and credit in getting water by an aqueduct from the river Colver, instead of from the Thames, as originally intended.³

When a corporation is authorized by an act to raise

¹ Kean v. Johnson, 1 Stockt. 401.

² Natusch v. Irving, Appendix to Gow on Part. 576.

³ Ware v. Grand Junction Water Co., *supra*. Although the details of the business of the corporation, and the making of its contracts must necessarily be under the control of a majority, yet a dissenting member cannot, by a vote

of a majority, and against his consent, be constituted a member of another corporation. But it has been held not to violate the private right of a dissenting stockholder when the others unite in selling all the corporate property, even though such sale be equivalent to a dissolution of the corporation. Lau-
mon v. Lebanon Valley R.R. Co., *supra*.

money for a specific purpose only, a majority of the shareholders cannot divert such money to another purpose against the will of a single shareholder; nor could all of the shareholders lawfully make such a diversion.¹ Although majorities may bind in the conduct of the corporate affairs, they cannot determine rights in the act of settlement and distribution. Even when the by-laws or articles give the largest control to majorities, they mean this only as a power in carrying on the business, and not in its dissolution and distribution among the members.² Where members of a corporation gave their notes and obligations to the corporation as collateral security against debtors of the company, on which notes and obligations they were only to be liable for the balance remaining due after other securities had been collected, it was held that a vote of the corporation to compromise the claims could not be regarded as assented to by the members so liable, if they were not present at the meeting at which the vote was passed, although they had legal notice of the meeting.³

But the legislature may give additional powers from time to time to corporations; and acts of the corporation in pursuance of such authority, are binding, unless they conflict with vested rights or impair the obligation of contracts.⁴ "It will not do to say that the subscriber is only presumed to consent to such changes or acts as are expressly authorized by the charter as it exists when he subscribes, and that he is always to be considered as protesting to any change of that charter, or enlargement of the powers of the corporation, no matter how manifestly it may promote the common good of all. Such a rule would, in all cases, preclude the possibility of ever altering the charter of any corporation without the express assent of

¹ Bagshaw v. Eastern Union R.R. Co., 7 Hare, 114.

² North Am. Mining Co. v. Clarke, 40 Pa. St. 432.

³ Am. Bank v. Baker, 4 Metc. 164.

⁴ Gifford v. N. J. R.R. Co., 2 Stockt. 171.

all the shareholders. . . . There must be a palpable abuse of power by the majority, or governing authority, to the prejudice of the minority, or dissenting portion, before the courts would be authorized to declare its exercise illegal. If the act is performed in good faith, and with the real intent to promote the best interests of the concern, though it might turn out disastrously, the act would be none the less legal. . . . It is true that the original purpose or object of the corporation may not be entirely changed or abandoned, and a new one undertaken; but we know of no instance where the mere limitation or enlargement of the original plan or purpose has been held not to be within the implied powers of the majority or controlling authority.”¹

¹ CATON, C. J., in *Sprague v. Ill. River R.R. Co.*, 19 Ill. 174. Where a controversy was pending in relation to a devise to a church and society as an existing organized association in a collective *quasi* corporate character, it was held competent for a majority of the

members of the society to agree to a compromise which should secure to the society a substantial benefit consistent with the provisions of the will, notwithstanding the dissent of the minority. *Horton v. Baptist Church*, 34 Vt. 209.

CHAPTER VI.

BY-LAWS.

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§ 72. **Definition and importance.**—A by-law may be defined a rule of a permanent character adopted by a corporation for its internal government, obligatory upon all of its members, and also upon others who are acquainted with the method of the corporation in doing business.¹ The power of a body politic to make fixed and known rules for the orderly and efficient conduct of its affairs, is necessary to enable it to accomplish the objects of its creation, which rules must, from the nature of the case, be for the most part left to the discretion of the corporation as being reasonably supposed to know what is most conducive to its own interests.² This power is, therefore, “included by law in the very act of incorporation; for as natural reason is given to the natural body for governing it, so by-laws or statutes are a sort of political reason to govern the body politic.”³ It was said in an early case with reference to

¹ Grant on Corp. 76; Cummings v. Webster, 43 Me. 192; Drake v. Hudson River R.R. Co., 7 Barb. 508.

² Green's Brice's Ultra Vires, 2d Am. Ed. 15.

³ 1 Blk. Com. 476; State v. Tudor, 5 Day, 329; State v. Guille, 3 Ala. 137; Came v. Brigham, 39 Me. 35; People v. Sailors' Snug Harbor, 54 Barb. 532; Poultney v. Bachman, 39 Hun, 49;

municipal bodies that "all corporations as such have power to make laws and ordinances, and need not special words in their patents to enable them thereunto. And if they have power to make laws of necessary consequence, they must have a power to inflict a penalty for the enforcing of that law. And surely it can be no exception that this penalty goes to the use of the body politic, for it is most reasonable that it should be so, for it is in the nature of damage for an injury done, and that injury is done to the body politic."¹

A by-law adopted under express authority given in the charter and in conformity therewith has the same binding force as though it was enacted by the legislature.² Although the common law annexes to a corporation certain incidental rights, among which is the right to adopt by-laws as private statutes for its government, yet when the charter expressly declares that the corporation shall have power to make by-laws in certain cases and for certain purposes, its power of legislation is limited to the cases and objects specified.³ The by-laws of municipal corporations are usually termed ordinances.

§ 73. **By whom made.**—In the absence of some law, or of immemorial usage to the contrary, the power to make by-

Kearney v. Andrews, 2 Stockton (10 N. J. Eq.), 70; Harrington v. Workmen's Benevolent Assoc., 70 Ga. 340; German Evangelical, etc., Cong. v. Pressler, 17 La. Ann. 127; Martin v. Nashville Building Assoc., 2 Coldw. Tenn. 418.

¹ City of London v. Wood, 12 Mod. 669. See Ayliffe Civ. L. 202, 203.

² Presbyterian Church v. New York, 5 Cowen, 538; Cummings v. Webster, *supra*; McDermott v. Board of Police, 5 Abb. Pr. 422; Kent v. Quicksilver Mining Co., 78 N. Y. 159.

³ Cunningham v. Ala. Life Ins. &

Trust Co., 4 Ala. 652; State v. Ferguson, 3 N. H. 424; State v. Morristown, 33 N. J. 57; Child v. Hudon's Bay Co., 2 P. Wms. 207. In the last-named case the company was empowered to make by-laws for the better government of the company, and for the management and direction of the trade to Hudson's Bay, which it was said implied a negative that it could not make any other by-laws, much less by-laws in relation to projects of insurance which by act of Parliament were declared to be illegal. See 2 Kyd on Corp. 102.

laws belongs to the members of the corporation at large.¹ It may, however, be vested in the corporation by the charter, or be reposed by the members in some particular part or body of the corporation, as, for instance, in the directors.² If special authority to make by-laws be given by the charter, such as purport to be made under it must fall within the scope of that authority.³ But when the charter confers power on a select body to make by-laws concerning certain specified objects, the body at large still has an incidental power to make by-laws as to matters not so specified.⁴

The power to adopt by-laws implies also the power to repeal them.⁵ Although voluntary associations frequently make constitutions and pass by-laws which they declare are not to be altered except in a certain way or manner, as by the concurrence of two-thirds or at two different meetings, yet their constitution and by-laws may at any time be altered or abrogated by the same power which created them; and the vote of any subsequent meeting altering or abrogating such constitution, though passed only by a majority, has as much efficacy as a previous vote establishing it.⁶ But notwithstanding a by-law provides that the board of directors may alter or amend any of their by-laws, they have no authority to disregard or alter a by-law which involves a limitation of their powers.⁷ As a general rule, mutual fire insurance companies have power to waive provisions of their by-laws which have been introduced for the

¹ *Rex v. Westwood*, 2 Dow & C. 21; 7 Bing. 1; *Union Bank of Md. v. Ridgely*, 1 Harr. & Johns. 324; *Salem Bank v. Gloucester Bank*, 17 Mass. 129; *Morton Gravel Road Co. v. Wy-song*, 51 Ind. 4.

² *Rex v. Spencer*, 3 Burr. 1827; *Rex v. Head*, 4 Id. 2521; *Willcocks, ex parte*, 7 Cowen, 402; *Cahill v. Kalamazoo Ins. Co.*, 2 Doug. Mich. 124.

³ *Calder, etc., Nav. Co. v. Pilling*, 14 M. & W. 81, 87. See *Richmond St. R.R. Co. v. Reed*, 83 Ind. 9.

⁴ *Per Parke B.*, 16 M. & W. 228.

⁵ *Rex v. Ashwell*, 12 East. 22; *Smith v. Nelson*, 18 Vt. 511.

⁶ *Smith v. Nelson, supra.*

⁷ *Stevens v. Davison*, 18 Gratt. 819.

benefit and protection of the company. Although their action in this respect may have been irregular, contrary to the established usage, and in violation of their own rules and by-laws, yet, if within the scope of their authority, they are bound by it.¹

When authority is given by the charter to make by-laws in a certain form and in a particular manner, the power must be strictly followed, and a by-law made differently will not be binding.² So, if the act of incorporation directs the mode of enforcing by-laws, no other mode of enforcing them can be adopted; for where the right and remedy are both created by law, the corporation must pursue the remedy provided by it.³ A person who has voluntarily become a member of a corporate body cannot object that the corporation had no power to make a by-law.⁴

Eleemosynary corporations differ from others with respect to the power to make by-laws. For the founder prescribes the rules and statutes, which the members cannot alter, modify, or amend.⁵ And the founder himself, after giving a body of statutes, cannot afterward give new statutes, or alter the old, without authority expressly reserved for that purpose, unless the corporation consent.⁶ But the trustees of the corporation may have power given them to make new statutes or amend the old ones.⁷

¹ *Union Mut. Ins. Co. v. Keyser*, 32 N. H. 313; *Hale v. Mut. Ins. Co.*, *Id.* 295.

² *Dunston v. Imperial Gas, etc., Co.*, 3 B. & Ad. 125. A by-law adopted at a meeting at which a quorum is not present is invalid. *Lockwood v. Mech. Nat. Bank*, 9 R. I. 308.

³ *Dundalk Western R.R. Co. v. Tappster*, 1 Q. B. 670; *Rex v. Head*, 4 Burr, 2515; *Shep. Touch.* 83; *Rex v. Ginever*, 6 Term R. 732.

⁴ *King v. Clerke, Salk.* 349; *Piper v. Chappell*, 14 M. & W. 640.

⁵ *Phillips v. Bury*, 1 Ld. Raym. 8;

Bentley v. Bishop of Ely, Fitzgib. 305; *Strange*, 912; *St. John's College, Cambridge, v. Toddington*, 1 Burr. 158, 197, 201; *Green v. Rutherford*, 1 Ves. Sen. 462; *Phillips Academy v. King*, 12 Mass. 546; *Dartmouth College v. Woodward*, 4 Wheat. 660; *Regina v. Dulwich College*, 8 Eng. L. & Eq. 385; 17 Q. B. 600.

⁶ *Ibid.*; 2 Kyd on Corp. 103.

⁷ *Eden v. Foster*, 2 P. Wms. 325. Where a usage of election contrary to one of the statutes was proved to have existed for a considerable period, a grant of liberty to depart from the

§ 74. **Must not be contrary to law.**—It is essential to the validity of a by-law that it should conform to the Constitution of the United States and the acts of Congress pursuant thereto, to the constitution and statutes of the State in which it is located, and to the general principles and policy of the common law as it is there acknowledged.¹ The Constitution being the supreme law of the land, and all enactments contrary to it void, it follows that no act of Congress or of a State legislature can give power to make unconstitutional laws and regulations.² “If,” remarks an English writer, “a by-law be contrary to the general laws of the kingdom, it is void, though justified by the terms of the charter; for all by-laws, says Hobart, must ever be subject to the general law of the realm, and subordinate to it; and if the king, in his letters patent of incorporation, make ordinances himself, they are subject to the same rule of law.”³ A by-law or regulation can only be a rule for future action. An amendment of the constitution of a corporation, enforcing a new penalty beyond those existing at the time of default, is not a valid regulation, but an adjudication on existing defaults, analogous to a foreclosure decree fixing a short time of payment, and clearly *ex post facto*.⁴ Where an act authorizing free banks declared that the shares should be personal property, and be transferable on the books of the corporation in such manner as the by-laws might direct, it was held that a by-law, adopted after

statutes in that particular was presumed. *Atty. Genl. v. Middleton*, 2 Ves. Sen. 330.

¹ See *Cunningham v. Ala. Life & Trust Co.*, 4 Ala. 652, per COLLIER, C. J.

² *U. S. v. Hart*, 1 Peters C. C. 390; *Stuyvesant v. New York*, 7 Cowen, 585; *State v. New York*, 3 Duer, 119; *People v. Crockett*, 9 Cal. 110; *Bullard v. Bank*, 18 Wall. 589; *Evansville Nat. Bank v. Metrop. Nat. Bank*, 2 Biss. 527; *Conklin v. Second Nat. Bank*, 45

N. Y. 655; *State v. Williams*, 75 N. C. 134; *Mount Moriah Cemetery Assoc. v. Com.*, 81 Pa. St. 235. See *Presbyterian Church v. City of New York*, 5 Cowen, 538; *People v. Crossly*, 69 Ill. 195; *Seneca County Bank v. Lamb*, 26 Barb. 595.

³ 2 Kyd on Corp. 109; *Norris v. Staps*, Hobart, 210.

⁴ *Pillford v. Fire Dept.*, 31 Mich. 458. See *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159, 178.

the issuing of the stock, that no transfer of stock should be made when the owner was indebted to the bank, did not bind the judgment creditors of the stockholder.¹ In another case, no lien having been given by the act of incorporation, and a by-law prohibiting the transfer of stock adopted after the death of a stockholder who was indebted to the company and insolvent, of which the purchaser of his shares had no notice, it was held that the purchaser was entitled to the stock. The court remarked that if, by such an *ex post facto* by-law the corporation could increase its rights in the distribution of the assets of the estate, it would not only work a wrong to the purchaser of the stock without notice, but diminish what was legally distributable to creditors upon the decease of the testator.² Where an act provided that payment of assessments might be enforced by sale of the shares, it was held that a by-law permitting an action against a stockholder for a deficiency after the sale, was repugnant to the statute and void.³ It is not in the power of a corporation to impose, by its by-laws, on third persons, nor on its own members in respect to third persons, any liability beyond what is specified in the charter or statutes of the State.⁴ Where the charter of a bank

¹ Byron v. Carter, 22 La. Ann. 98.

² Steamship Dock Co. v. Heron, 52 Pa. St. 280.

³ Jay Bridge Co. v. Woodman, 31 Me. 570. See Auburn Academy v. Strong, Hopk. Ch. 278.

⁴ Mechanics' Bank v. Smith, 19 Johns. 115; Marietta v. Fearing, 4 Ohio, 427; Flint v. Pierce, 99 Mass. 68; Susquehanna Ins. Co. v. Perrine, 7 Watts & Serg. 348; Smith v. Smith, 52 Ill. 174. See State v. Curtis, 9 Nevada, 325. Such a power over members "would be liable to great abuse, and would subject every member of a corporation, however liberal its charter in excluding individual liability, to be made responsible for the entire indebt-

edness of the corporation by the act of a majority of those convened at a meeting of such corporation. Take the case of a bank in doubtful credit, and its managers deem it useful to sustain it by pledging the individual responsibility of some of its more wealthy stockholders. Can they, by a corporate vote, impose upon all the stockholders a personal liability for all the debts of the corporation? We think not, and are of opinion that each stockholder, by becoming such, subjects himself to no liability beyond that created by the force of the charter itself, or declared by other statutes." DEWEY, J., in Free Schools v. Flint, 13 Metc. 539.

gives the directors power to make such by-laws, rules, and regulations as shall be needful touching the time, manner, and terms at and upon which discounts and deposits shall be made and received by the bank, their authority is limited to the making of by-laws, rules, and regulations to operate upon and control the internal conduct of the business of the bank,—to restrain its own officers and servants in the management of its affairs, and not the public at large, nor the rights and interests of third persons.¹ A by-law of a merchants' exchange, providing that members should submit their controversies to arbitration, on pain of expulsion if they brought suit, was held void as being contrary to public policy; every person having a right to resort to the courts, rather than to arbitrate, if he chose to do so.² A by-law of a municipal corporation forbidding the interment of dead bodies in a city is valid, although the right had been exercised one hundred years under grants of land held in trust for that purpose to which fees for interment were incident.³ An act of incorporation authorized the corporate body to establish such rules and regulations for the management of its business, and the mode in which it should be transacted, as it might deem proper, and conferred upon it express power to admit, and to suspend or expel members, as it might see fit in the manner prescribed by the rules and by-laws. It was held that a by-law was good which provided that if a member should be found guilty of a failure to comply promptly with the terms of any contract, either verbal or written, it should constitute a ground for the suspension or expulsion of such member from the privileges and benefits of the corporation, notwithstanding the contract not fulfilled was void by the statute of frauds.⁴ A

¹ Seneca County Bank v. Lamb, *supra*.

² State v. Merchants' Exchange, 2 Mo. App. 96.

³ Coates v. Mayor, etc., of New York, 7 Cowen, 585.

⁴ Dickenson v. Chamber of Commerce, 29 Wis. 45.

by-law is not void because the same subject has been regulated by statute.¹

When a by-law is entire, each part having a general relation to the rest, if one part is void the whole is void. But where a by-law consists of several distinct and independent parts, though one or more of them be void, the rest may be valid. And this rule is applicable to the different clauses of the same by-law. For where a by-law consists of several particulars, it is, for all practical purposes, like several by-laws, though the provisions are thrown together in the form of one.²

A by-law need not recite that it is necessary, such necessity being implied.³ But in every question in relation to corporate right should be manifest; if involved in any doubt, this circumstance alone is a strong legal objection to it.⁴

§ 75. **Must be reasonable.**—The power to make by-laws must be exercised reasonably, and with sound discretion, without oppression or vexation, strictly within the charter, and consistently with the general law of the State.⁵ A by-law which provided that on the annual appointment of the officers of the corporation they should provide a dinner for the members, and that any one who was absent should

¹ *Rogers v. Jones*, 1 Wend. 237. In this case WOODWORTH, J., said: "As to storing gunpowder in New York, the legislature and corporation have each imposed the same penalty. Suits to recover the penalties have been sustained under the corporation law. It is believed that the ground has never been taken that there is a conflict with the State law."

² *Amesbury v. Bowditch Mut. Fire Ins. Co.*, 6 Gray, 596; *Rogers v. Jones*, 1 Wend. 237; *State v. Curtis*, 9 Nevada, 325.

³ *Coates v. New York*, 7 Cowen, 585; *Tuttle v. Walton*, 1 Ga. 43.

⁴ *Zlystra v. Charleston*, 1 Bay. 382; *McMullan v. Charleston*, *Ib.* 46. See *Barter v. Com.*, 3 Pen. & W. 253.

⁵ *Mobile v. Yuyllé*, 3 Ala. 137; *Paxson v. Sweet*, 1 Green N. J. 196; *People v. N. Y. Commercial Assoc.*, 18 Abb. Pr. 271, 279; *Hibernia Fire Engine Co. v. Harrison*, 93 Pa. St. 264. "The unreasonableness of a by-law should be demonstrably shown. Courts in construing by-laws will interpret them reasonably if possible, not scrutinizing their terms for the purpose of making them void, nor holding them invalid if every particular reason for them does not appear." *Ib.*

pay his proportion of the expense under a penalty, was held good.¹ A by-law providing that two members of the corporation shall be annually chosen stewards for the ensuing year, and that the stewards shall furnish a dinner for the masters, wardens, and assistants, under a penalty of ten pounds, is bad, it not appearing what is the object of the dinner. "But if it had been to make the dinner to the end that the company might assemble and choose officers, or any other thing for the benefit of the corporation, it had been well enough. But in the case of old corporations by prescription, a by-law to make a customary feast has been held good."² A similar by-law was held bad, not only because a burden was cast on the steward for which no sufficient reason was alleged, but on account of the impolicy of multiplying oaths; the by-law providing that the penalty should be enforced, unless the person in default would swear that he was not worth three hundred pounds.³ A by-law of a company of artisans, that every member, whether he use the trade or not, shall pay a given sum quarterly for the benefit of the company, there being nothing to show that the rightful expenditures of the company require any such contribution, is bad.⁴ Where a by-law of a medical society established a tariff of fees to be charged by members for medical services, and provided that any member who refused to comply with it should be expelled upon a vote of a majority of the members present, it was held that such a regulation was unreasonable, against public policy, and in conflict with well-settled principles of law.⁵ A by-law of a benevolent society providing that

¹ Lutw. 1324.

² Framework Knitters v. Green, 1 Ld. Raym. 114. See Wallis' Case, cited Lutw. 1320.

³ Carter v. Anderson, 5 Bing. 79. See Scriveners' Co. v. Brooking, 3 Q. B. 95.

⁴ Tobacco-Pipe Makers v. Woodroffe, 7 Barn. & Cress. 838.

⁵ People v. Medical Soc., 24 Barb. 570. "The only implied means for the enforcement of corporate charges and penalties is by action. Summary means and methods unknown to the common

any member who shall be three or more months in arrears, may have a voice in the society on the payment of the whole amount due, but shall be deprived of benefits for three months after liquidating the same, is unreasonable and void. Such a by-law subjects a member to a *quasi* penalty after the payment of his dues and the performance of his duty, and for a prospective period. The deprivation to which he is subjected is therefore based upon the omission of a duty which has been discharged. The court remarked that it was not only unreasonable, but oppressive, and detrimental to the interests of the corporation.¹ There is no power in a corporate body, nor in a majority of the stockholders, to provide, by by-law, for the creation of a preferred stock, so as to bind a minority of the stockholders not assenting thereto.² A by-law disturbing a vested right is unreasonable, and inconsistent with the principles of law; and it makes no difference that power to make and alter by-laws is expressly given to a majority of the stockholders, and that the by-law is passed in due form.³

§ 76. **By-laws which are proper.**—By-laws imposing penalties for non-attendance at corporate meetings, and for refusal to accept office, and providing for the transfer of shares, are valid.⁴ Where the by-laws of a benevolent society were adopted and acted under before the society was incorporated, it was held that a by-law was not so unrea-

law must be authorized by express authority, and it would not be reasonable to enforce a pecuniary obligation or penalty by means disproportionate to its importance." CAMPBELL, J., in *Pulford v. Fire Department*, 31 Mich. 458.

¹ *Cartan v. Father Mathew Soc.*, 3 Daly, 20, per BRADY, J. See *Pentz v. Citizens' Fire Ins., etc., Co.*, 35 Md. 73.

² *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159.

³ *Ibid.* 182, 183, per FOLGER, J.

⁴ *Pipe-Makers v. Woodroffe*, 7 Barn. & Cress. 838; *Farmers', etc., Bank v. Wasson*, 48 Iowa, 336. See *Weston's Case*, L. R. 4, Ch. 20; *Gilbert's Case*, L. R. 5, Ch. 559. Under a custom to exclude foreigners from exercising a trade within a city, a by-law giving the penalty to any but the corporation is bad. *Totterdell v. Glazby*, 12 Mod. 266.

sonable as to require a court of equity to declare it void, which provided that the members should be dropped unless they paid the fines imposed for delinquencies; that a trial should be had before a council composed of a select number of members, without right of appeal; and that only members should be permitted to testify.¹ The objects of a society set forth in its charter were "to afford relief to the members thereof, and their families, in cases of sickness, to defray the expenses of their funerals, or such other cases of distress as may be defined by the by-laws." One of the by-laws provided that at the death of a member, there should be paid to his widow, or legal representative, the sum of sixty dollars. Another by-law directed that the stewards should withhold all benefits, when intemperance, debauchery, fighting, dueling, or other disgraceful practices were the cause of disease or death. Held not an unreasonable regulation.² A mutual insurance company, under a

¹ *Hussey v. Gallagher*, 61 Ga. 86.

² *St. Mary's Beneficial Soc. v. Burford*, 70 Pa. St. 321; 4 Am. Corp. Cas. 125. AGNEW, J.: "An association of this kind is formed for the benefit of its members. Being a purely voluntary association, it may adopt such reasonable regulations as are conducive to their interests. Now, unless we deny that temperance and regularity of habits have much to do with health and long life, we must concede that the value of the benefits to be derived from such an association depends greatly on the good conduct of its members. Then, clearly, the members have not only the right to choose their associates, but to stipulate, also, for the power to prohibit their indulgence in those vices and crimes which multiply disease and death among them, and thus diminish the general fund. It is not the purpose of the by-law to regulate behavior. Were that its true

character, it might be said with reason that it was no purpose of the charter to regulate conduct, and that it must be left to divine and human laws. But this law strikes only at those acts which are the causes of disease and death. These being the events on which relief is made to depend, the law says to the member: It is only to your misfortunes that the purpose of the association extends, and if, by your guilty or disgraceful fault, you bring upon yourself disease and death, you exclude yourself from the provided relief. . . . The motive it presents to good conduct is worthy of notice. What more powerful incentive than a knowledge, on the part of the member, that by a course of debauchery and crime, he cuts himself off from the relief? The by-law, therefore, appears to be reasonable, and to promote the well-being of all the associates collectively and individually."

charter authorizing it to establish such by-laws and regulations for the transaction of business as the company might deem expedient, adopted a by-law that if a person insured, at the time of receiving his policy, gave the company his premium note, promising to pay the amount named in it at such times and in such portions as the directors of the company might require, to meet his proportion of the losses and expenses of the company, and should not pay the sum assessed on such note in thirty days after published notice of the assessment, the directors might bring an action and recover the whole amount of his premium note; the balance, if any remained after the payment of such assessment, to be returned after the expiration of his policy. The by-law was held valid, it being a contract to which the insured was a party, and therefore binding on him.¹ A by-law of a mutual fire insurance company which was made a part of a policy, provided that "it shall be the duty of the insured to give notice to the secretary of the corporation of such material and manifest increase of the risk as may have happened without his agency or consent after the reception of his policy, whereupon the officers of the company may agree with the insured on such increase of the premium as the said officers may deem sufficient to cover said increased risk; or they may withdraw the insurance altogether should they deem such increased risk too great to be taken according to the rules and regulations of the company; and, in case the insured shall neglect to give notice aforesaid, his policy from that time shall be void." It was held that the not giving the company notice of an

¹ Cahill v. Kalamazoo Mu. Ins. Co., 2 Doug. 124. See Wellcome v. People's Ins. Co., 2 Gray, 480; Bowditch Mu. Ins. Co. v. Winslow, 3 Ib. 415. A by-law of a mutual insurance company provided that all policies which might issue from the company should be void

unless such previous insurance was indorsed on the policy when it issued. It was held that an express approval and consent to such previous insurance in the policy itself, was a sufficient compliance with the by-law. Philbrook v. New England Mu. Ins. Co., 37 Me. 137.

increased risk rendered the policy void, notwithstanding the loss did not arise from such increased risk, and that it was not competent for the court to relieve the insured from the consequences of his own contract.¹ A bank was empowered by its charter to ordain, establish, and put in execution such by-laws, rules, and regulations, as should seem necessary for the government of the corporation. A by-law was held valid which provided that it should be the duty of every other officer to perform such services as might be required of them from time to time by the president or cashier.²

By-laws which are reasonable, and beneficial to the corporation, have been sustained although they reduced the number of the electors to narrower bounds than were marked out by the charter. Where the act incorporating a religious society declared that no person should vote who had not been a member of the church twelve months preceding the election, a by-law which provided that, although he had been a member during that time, he should not vote if his pew had been in arrears more than two years, was held valid. TILGHMAN, C. J.: "In the present case, no person is excluded from voting unless he is in default in a matter essential to the support of the church; and he may reinstate himself in his privilege by paying his debt. Nothing is more manifestly for the good of the church than this by-law. Without funds the church cannot exist, and it will be torn to pieces by dissension if the funds are to be collected by suits at law against those who are in arrears. So that this rule is calculated to support the corporation, and preserve harmony among its members."³

In order to avoid a by-law on the ground of its being un-

¹ Gardiner v. Mu. Ins.Co., 38 Me. 439.

² Planters' Bank v. Lamkin, R. M. Charl. 29.

³ Com. v. Cain, 5 Serg. & Rawle, 510. A by-law of a religious society is valid

which provides that if, at an election, a ballot contains anything besides the name of the candidate, it shall not be voted. Com. v. Woelper, 3 Serg. & Rawle, 29.

reasonable, because of some inconvenience that may result from it, it should appear to be a probable inconvenience ; for one can hardly predicate of any by-law that some possible inconvenience may not result from it.¹ The fact that the by-law has been in force some time, is evidence to show that it has no intrinsic inconvenience.²

§ 77. **Validity of regulations.**—Rules or regulations of corporations which affect the rights of third persons who are not members, though not properly speaking by-laws, are somewhat similar in their nature, and require mention under the same head. Of this character are all regulations of railroad companies, touching the comfort, convenience, and safety of travelers, or prescribing rules for their conduct to secure the just rights of the company. It is a reasonable regulation to set apart a particular car for ladies, and gentlemen with ladies ;³ but not to exclude a gentleman from the ladies' car when there is a seat in it and no unoccupied seat in another car, or to put him out after he has taken a seat without knowledge of the regulation.⁴ The validity of a regulation that passengers shall purchase their tickets beforehand, exhibit them when reasonably requested, and surrender them when asked to do so, by the person in charge, cannot be questioned.⁵ "But it would scarcely be contended that a regulation requiring passengers continually, or as often as the caprice or malice of a conductor might require it, to exhibit their tickets, forbidding them to speak or change their seats from one part of the car or saloon to another, when the right of no other passenger was affected, was a regulation lawful in itself, or which might safely be enforced. This latter class of regulations are no

¹ *Rex v. Ashwell*, 12 East, 22, per ELLENBOROUGH, C. J.

² *Ibid.*

³ *Chicago, etc., R.R. Co. v. Williams*, 55 Ill. 185. See *Holden v. Hoyt*, 134 Mass. 181.

⁴ *Bass v. Chicago, etc., R.R. Co.*, 36 Wis. 450.

⁵ *Ill., etc., R.R. Co. v. Whittemore*, 43 Ill. 420 ; *Pullman Palace Car Co. v. Reed*, 75 Ib. 125. See *Jennings v. Great Northern R.R. Co.*, L. R. 1, Q. B. 7.

more in violation of the charter of the company, or of any particular statute, than the former. But they would be held unlawful, because they are unreasonable, and an unnecessary infringement of the rights and liberty of travelers. The distinction between such regulations as are necessary to the comfort and convenience of travelers, or to protect the rights of the company, must, from its very nature, be a question of fact rather than of law."¹ A railroad company may discriminate in charges in favor of those who buy their tickets before entering the cars, subject to an obligation on the part of the company to afford passengers an opportunity to purchase tickets.² A regulation that passengers not producing or delivering up their tickets on leaving the company's premises, should pay fare from the place where the train originally started was held reasonable.³ But an additional provision that any such passenger should also forfeit a given sum, not exceeding a specified amount, was held only applicable to a passenger who had a ticket and refused to give it up, and not to one who had not procured a ticket, and had no intent to defraud the company.⁴ A rule that tickets shall be capable of being used only on the day they are issued, is proper.⁵ A regulation of a canal company that no boat would be allowed to pass a lock on Sunday without a written permit from the superintendent or his assistant, which would only be granted in case of actual necessity, was held unreasonable and void, as it made the superintendent or his assistant the judge of the exist-

¹ *State v. Overton*, 4 Zab. 435, per GREEN, Ch. J. In *Vedder v. Fellows*, 20 N. Y. 126, the reasonableness of a regulation that passengers on a railroad should surrender their tickets, was held to be a question of law.

² *Indianapolis, etc., R.R. Co. v. Rinard*, 46 Ind. 293; *Jeffersonville R.R. Co. v. Rogers*, 28 Ib. 1.

³ *Chilton v. London R.R.*, 16 M. & W. 212.

⁴ *Dearden v. Townsend*, L. R. 1, Q. B. 10.

⁵ *Boice v. Hudson River R.R. Co.*, 61 Barb. 611; *Elmore v. Sands*, 54 N. Y. 512; *McClure v. Phila., etc., R.R. Co.*, 34 Md. 542. But see *Pier v. Finch*, 24 Barb. 514; S. C. 29 Id. 170; *Beebe v. Ayres*, 28 Id. 275; *Northern R.R. Co. v. Page*, 22 Id. 130.

ence of the necessity, whereas that was a question to be determined by the person in charge of the boat, subject only to his liability under the law.¹ Although a regulation of a telegraph company, the design of which is to protect the company from responsibility on account of the gross negligence or fraud of its agents or employés in the transmission or delivery of a message which the company undertakes, for a valuable consideration, to send, is unreasonable, against public policy, and void.² Yet, there is no good ground why the liability of a telegraph company may not be limited by reasonable stipulations expressed in its contracts with the senders of messages. A regulation that the liability of a telegraph company for any mistake or delay in the transmission or delivery of a message, or for not delivering the same, shall not extend beyond the sum received for sending it, unless the sender orders the message to be repeated by sending it back to the office which just received it, and pays half the regular rate additional, seems to be a justifiable precaution on the part of the company, binding upon all who assent to it.³ But the contrary has been held in Illinois.⁴

¹ *McArthur v. Green Bay, etc., Canal Co.*, 34 Wis. 139; *Am. Corp. Cas.* 625.

² *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; *Redpath v. Western Union Tel. Co.*, 112 Mass. 71.

³ *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; 5 *Am. Corp. Cas.* 447. GRAY, Ch. J.: "The liability of a telegraph company is quite unlike that of a common carrier. A common carrier has the exclusive possession and control of the goods to be carried, with peculiar opportunities for embezzlement or collusion with thieves; the identity of the goods received with those delivered cannot be mistaken; their value is capable of easy estimate, and may be ascertained by inquiry of the consignor, and the carrier's compensation fixed ac-

cordingly, and his liability in damages is measured by the value of the goods. A telegraph company is intrusted with nothing but an order or message, which is not to be carried in the form in which it is received, but is to be transmitted or repeated by electricity, and is peculiarly liable to mistake; which cannot be the subject of embezzlement; which is of no intrinsic value; the importance of which cannot be estimated except by the sender, not ordinarily disclosed by him without danger of defeating his own purposes; which may be wholly valueless if not forwarded immediately; for the transmission of which there

[For continuation of note see next page.]

⁴ *Western Union Tel. Co. v. Tyler*, 60 Ill. 421; 74 *Ib.* 168; *Am. Corp.*

§ 78. Must not be in restraint of trade.—At common law any man might exercise whatever trade he pleased without limitation or control, and in England a number of statutes were passed at a very early period to protect that right.¹ It was anciently laid down that all charters in hindrance of trade were void,² and it was said that a settled usage would

[Continuation of note 3 on preceding page.] must be a single rate of compensation; and the measure of damages for a failure to transmit or deliver which has no relation to any value which can be put on the message itself." In Massachusetts it is provided (Genl. Sts., ch. 64, sec. 10) that a telegraph company shall receive dispatches from and for other telegraph lines, companies, and associations, and from and for any person; and, on payment of the usual charges for transmitting dispatches, according to the regulations of the company, shall transmit the same faithfully and impartially. The restricted liability of the company, as mentioned in the text, is maintained in the following cases: *Ellis v. Am. Tel. Co.*, 13 Allen, 226; *Redpath v. Western Union Tel. Co.*, 112 Mass. 71; *McAndrew v. Electric Tel. Co.*, 17 C. B. 3; 33 Eng. L. & Eq. R. 180; *Breese v. U. S. Tel. Co.*, 45 Barb. 274; 48 N. Y. 132; *Wann v. West. Union Tel. Co.*, 37 Mo. 472; *Camp v. Western Union Tel. Co.*, 1 Metc. 164; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; 4 Am. Corp. Cas. 372.

[Continuation of note 4 on preceding page.] Cas., vol. 5, 317. BREESE, J.: "On the question" (in the court below) "whether a regulation requiring messages to be repeated, printed on the blank of the company on which a message is written, is a contract, we held it was not a contract binding in law, for the reason the law imposed upon the companies duties to be per-

formed to the public, and for the performance of which they were entitled to a compensation fixed by themselves, and which the sender had no choice but to pay, no matter how exorbitant it might be. Among these duties we held was that of transmitting messages correctly; that the tariff paid was the consideration for the performance of this duty in each particular case, and when the charges were paid, the duty of the company began, and there was therefore no consideration for the supposed contract requiring the sender to repeat the message at an additional cost to him of fifty per cent. of the original charge." Referring to *Bartlett v. Western Union Tel. Co.*, 62 Me. 209; *Candee v. Western Union Tel. Co.*, 34 Wis. 471; *In Sweatland v. Ill. & Miss. Tel. Co.*, 27 Iowa, 433; 3 Am. Corp. Cas. 306, it was held that while the company might limit its liability by conditions or stipulations, it was notwithstanding responsible for the want of ordinary care on the part of its operators; but that where the condition as to repeating existed, and was known to the sender, or where he was bound to take notice of it, and a mistake occurred in an unrepeatable message, the mere proof of such mistake, without some other evidence of carelessness or negligence on the part of the company would not make it liable. See *True v. International Tel. Co.*, 60 Me. 9.

¹ 2 Kyd on Corp. 125 *et seq.*

² *Rex v. Hanger*, 1 Rol. R. 148.

be a ground for presumption against very strong words of a charter if the charter was in restraint of trade.¹ By-laws against trade are opposed to the common law which favors trade, and are not allowed except by particular custom. No one is required to depend for the fair and innocent exercise of his business on the will of a corporation by its licensing his trade at its pleasure, prohibiting it altogether, or crippling it by heavy charges and penalties.²

Although by-laws in general restraint of trade are void, yet trade may be regulated and restrained to a certain extent in a particular place if such restraint be for the good of the inhabitants; as when, for the prevention of nuisances, certain trades are confined to the suburbs of a city, or where the by-law is for the benefit of the trade and improvement of the commodity.³ In England by-laws founded on custom have been supported as good, which, without such custom, would have been void; and on this principle depends the distinction with respect to the force

¹ *Berwick v. Johnson*, Lofft. 334.

² *Dunham v. Rochester*, 5 Cowen, 462.

³ *Mobile v. Youille*, 3 Ala. 141, and cases cited; *Cunningham v. Ala. Life Ins. & Trust Co.*, 4 Ib. 562. "Of by-laws which affect trade, a distinction runs through all the books between those which impose a restraint on it and those which introduce a reasonable regulation of it; those which are decided to be of the first kind are uniformly held to be void, and those of the latter are good; but it is not always easy to agree with the courts in their decisions as to what shall be considered a restraint and what only a reasonable regulation of trade." 2 *Kyd on Corp.* 131. The general rule is that all restraints of trade are bad. But to this general rule there are some exceptions. At first, that if the restraint be particular as to time and

place, and there is a good consideration given to the person restrained, a contract or agreement upon such consideration so restraining a particular person may be good. So likewise, if the restraint appear to be of manifest benefit to the public, such a restraint by a by-law or otherwise may be good. For it is to be regarded rather as a regulation than a restraint, and it is advantageous to trade that proper regulations should be made in it. *Gunmakers v. Fell, Willes*, 384. In the foregoing case, a by-law that no member of the company should sell the barrel of any hand gun to any person of the trade not a member, in London or within four miles of it, and that no member should stamp or mark a gun-barrel of any person not a member of the company, under a penalty of ten shillings for each offense, was held bad as being in restraint of trade.

and validity of some by-laws which have been held good in London, but void in other places. A custom that "no stranger shall intermeddle in London or Southwark with the trade of the company of weavers in London, the company being a corporation by prescription," was held good; but it was also held that it was not an infringement of this custom that a stranger bought silk, or linen yarn, or wool, took it to the country, wove it, and then returned to London and sold the cloth.¹ But a custom to make by-laws in restraint of trade will not be favored, and must be strictly proved.² A modern writer says: "Almost any by-law, if founded on immemorial custom, may be supported, although it be in itself idle or unreasonable. However, it may be doubtful if the spirit of the decision of which the above is the effect would be adhered to at present; for the tendency of the courts has been of late to declare void all customs which are not in themselves reasonable, without regard to the question whether they might once have been reasonable, although the older authorities held that customs could not be deemed to be void for unreasonableness unless it could be shown that they never could have been reasonable."³ A by-law against common right will be void. The tailors and cloth-workers of Ipswich having been incorporated with power to make reasonable by-laws, adopted a by-law that "no person exercising any of these trades within the town of Ipswich should keep any shop or chamber, or exercise the said faculties, or either of them, or take an apprentice or journeyman until he had presented himself to the master and wardens of the said society for

¹ Corporation of Weavers in London v. Brown, 1 Cro. 803, cited in 2 Kyd on Corp. 141. See Harris v. Wake-man, Sawyer, 255; Shaw v. Poynter, 2 A. & E. 324; Broad v. Jollyfe, Cro. Jac. 597.

² Winton v. Wilks, Salk. 203, per LITTLEDALE, J.; Hesketh v. Brad-

dock, 3 Burr, 1858; Colchester v. Goodwin, Carter, 117, 120.

³ Grant on Corp. 82, referring to Wallis' Case, Cro. Jac. 555; Hix v. Gardiner, 2 Bulst. 195, 196; Rogers v. Brenton, 10 Q. B. 26; Cudden v. Estwick, 6 Mod. 124.

the time being, or some three of them, and should prove that he had served seven years at the least as an apprentice, and before he should be admitted by them to be a sufficient workman." It was held that as the statute had not restrained a person who had served as an apprentice for seven years from exercising the trade of a tailor, the by-law could not prohibit him from exercising his trade until he had presented himself before the company, or until they allowed him to be a workman, for that these were against the liberty and freedom of the subject, and enabled the old and rich of the same trade to oppress the young tradesmen by delay or the extortion of money.¹ A by-law of a town restricting the privilege of taking shell-fish in a navigable river within its limits to its own inhabitants is bad,² unless the town has the exclusive right of fishing in its waters.³ A by-law of London that no cartman within the city should go with his cart without a license from the wardens of a certain hospital under a penalty for each offense, was held void because it was in restraint of the liberty of the trade of a cartman, and unreasonable because it went to the private benefit of the wardens of the hospital and was in the nature of a monopoly.⁴ A by-law adopted by an association of common carriers providing that any member who should carry freight for less than a certain fixed rate should be liable to a fine, is void as against public policy.⁵

The right of alienation is an incident of property, and a by-law prohibiting this right, or imposing any restriction on its exercise, would be in restraint of trade, and against public policy, and void.⁶ Where a company of oystermen prohibited any member from being engaged in the trade of

¹ Case of Tailors of Ipswich, 11 Co. 53, 54.

² Hayden v. Noyes, 5 Conn. 391.

³ Rogers v. Jones, 1 Wend. 237.

⁴ 1 Rol. Abr. 364, Pl. 5.

⁵ Sayre v. Louisville, etc., Assoc., 1 Duvall, Ky. 143.

⁶ Moore v. Bank of Commerce, 52 Mo. 377.

sending oysters to market from any other ground on the Kentish shore than the oyster ground of the company under a penalty of ten pounds, and in case of refusal to pay the same, that such member should thenceforth, and until the fine was paid, be excluded from all share of the profits to be thereafter made by the joint trade of the company, the by-law was held void.¹

A by-law of a city prohibiting under a penalty any person without a license from removing house-dirt and offal from the city, is not in restraint of trade, but reasonable and proper;² and the same is true of a by-law of a city which prohibits fast driving in the streets.³

§ 79. **Cannot impose a forfeiture.**—A corporation, without authority expressly given by the charter, cannot adopt a by-law subjecting to forfeiture the shares of stockholders for the non-payment of instalments due on such shares.⁴ When a corporation is empowered to enforce its by-laws by fine, or in any other prescribed manner, it is by implication precluded from adopting any other punishment for disobedience to them.⁵ In England a by-law imposing a forfeiture of goods is void, though authorized by letters patent.⁶ And a power granted to a corporation of dyers to search, and if they found cloth dyed with logwood to seize and forfeit it, was adjudged void as contrary to Magna

¹ *Adley v. Reeves*, 2 Maule & Selw. 53. Lord ELLENBOROUGH, C. J.: "It is true, undoubtedly, that if the law give a power of inflicting a penalty, where it gives the end, it also gives the common means of attaining it by action; but it does not give any extraordinary means. On this ground alone the case may be decided; and it becomes unnecessary to determine how far, if the by-law had not contained these extraordinary means of compelling payment of the penalty, it might in some respects have been good."

² *Vandine's Case*, 6 Pick. 187.

³ *Com. v. Worcester*, 3 Pick. 462; *City Council v. Dunn*, 1 McCord, 333.

⁴ *Matter of Long Island R.R. Co.*, 19 Wend. 37; *Cotter v. Doty*, 5 Ohio, 393; *Small v. Herkimer Manuf. Co.*, 2 N. Y. 330; *Eastern Plank Road Co. v. Vaughan*, 20 Barb. 155; *Downing v. Potts*, 23 N. J. 66.

⁵ *Hart v. Mayor, etc., of Albany*, 9 Wend. 571.

⁶ 2 Kyd on Corp. 109; *Clark v. Tucket*, 3 Lev. 281.

Charta.¹ So a by-law which is lawful cannot be enforced by an extraordinary penalty, such as imprisonment or forfeiture of goods, or by distress and sale of goods; for no man can be imprisoned or dispossessed of his goods and chattels, except by the verdict of his peers, or the law of the land. If such penalties were allowed, corporations would be enabled to set up private particular laws in contradiction to the law of the land, which is against the nature and essence of a by-law. An act of the legislature does not by implication invest the corporation with any extraordinary authority; and if such authority is intended to be given, it must be by express words to that effect. In *Kirk v. Nowill*,² which was an action of trespass for seizing a quantity of forks under a by-law, the defendant justified under an act of Parliament incorporating the inhabitants of the liberty of H. into a company of cutlers. The act authorized the adoption of such by-laws as appertained to good regulation and workmanship in the manufacturing of cutlery wares, with power to impose reasonable pains, penalties, and punishments by fine or amercement in case of violation, to be levied to the use of the corporation for the benefit of the poor. The company ordained that the searchers (officers recognized in the act) should search for unworkmanlike wares and seize, carry away, and destroy them. The property was seized by virtue of this by-law. Lord MANSFIELD observed that a corporation, in the definition of it, was a creature of the crown created by letters patent; that such a corporation with the power of making by-laws, could not make a law imposing a forfeiture; that those corporations which were created by act of Parliament had no more power than those which were created by charters, unless additional power was expressly given; and that as no such extraordinary power as the making of by-laws to impose a forfeiture appeared to have been conferred,

¹ *Waltham v. Austin*, 1 Bulstr. 11, 12.

² 1 Term Rep. 118.

it was impossible for the court to say that the by-law in that case could be supported by the act. BULLER, J., said that taking it generally as a by-law creating a forfeiture, the act of Parliament not having given the corporation power to make such a by-law, it was bad on that ground ; and that in all of the cases in which power to declare a forfeiture of stock had been incidentally noticed by the courts, as expressly given by the charter, it had been regarded as a new and cumulative remedy to the one existing at common law.¹ An act incorporating a religious society gave the society power to provide for the sale or forfeiture of the shares or rights of pewholders for the non-payment of assessments. The only article in the constitution of the society bearing upon the subject provided that the proprietors might, at a meeting called for that purpose, by a two-thirds vote tax themselves to raise money to repair their meeting-house when necessary. It was held that the society had no right to enforce payment of assessments by a sale or forfeiture of the pews of delinquent members.² In Massachusetts a by-law of a religious society that the owner of a pew should forfeit it to the society if he left the church without first offering to sell the pew to them, was held not in violation of the rule against perpetuities ; the doctrine in that State that conditions against alienation in a conveyance in fee simple are void, not being applicable to conveyances of pews.³

§ 80. **Creating lien on shares.**—There is no lien at common law against stock for indebtedness of the stockholders to the corporation. A different rule would be contrary to the doctrine of that law against secret liens. When such a lien exists, it is either expressly provided for in the act of

¹ See opinion of NELSON, Ch. J., in Matter of Long Island R.R. Co., *supra*.

² Perrin v. Granger, 30 Vt. 595.

³ French v. Old South Soc., 106 Mass. 479.

incorporation, or through by-laws adopted pursuant thereto.¹ "The quality of transferability being attached to the shares, the corporate body has not authority to interfere with the disposition of them which any shareholder may see fit to make, except so far as such authority is conferred by the act itself, or by some general law applicable to the case."² The rule has long prevailed that a corporation has no implied lien on the shares of a stockholder for debts due from him, and cannot hold them against a purchaser or attaching creditor; but that the company deals with its stockholders in the same manner it does with its general customers, taking the same security, and not relying upon its stock.³ A different rule has been adopted in relation to dividends declared. They are regarded as so much money in the possession of the corporation belonging to the stockholder, which are to be considered as pledged to the payment of any just debt then due from him.⁴ Although, under the

¹ *Heart v. State Bank*, 2 Dev. Eq. 111; *Dana v. Brown*, 1 J. J. Marsh, 306; *Utica Bank v. Smalley*, 2 Cowen, 770; *Farmers' Bank of Md. v. Iglehart*, 6 Gill, 50; *Mass. Iron Co. v. Hooper*, 7 Cush. 183; *Steamship Doek Co. v. Heron*, 52 Pa. St. 280. It was said by the court in the last-named case that it had not only been doubted but generally denied that a mere by-law would be sufficient to create a lien on stock for a general balance due the company in the cases of trading, manufacturing, or other corporations not engaged in loaning money, and that it certainly would not be, unless notice of the by-law were brought home to a purchaser of stock before the purchase.

² *Bank of Attica v. Manf. & Traders' Bank*, 20 N. Y. 501.

³ *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; *Bank v. Lanier*, 11 Wall. 369; *Bullard v. Nat. Eagle Bank*, 18 Id. 589; *Pendergast v. Bank of Stockton*, 2 Sawyer, 108; *Evansville Nat.*

Bank v. Metrop. Nat. Bank, 2 Biss. 527; *Matter of Long Island R.R. Co.*, 19 Wend. 37; *McCready v. Ramsey*, 6 Duer, 574; *Anglo-California Bank v. Grangers' Bank*, 63 Cal. 359; *Steamship Dock Co. v. Heron*, 52 Pa. St. 280; *Merchants' Bank v. Shouse*, 102 Id. 488; *Planters', etc., Co. v. Selma Savings Bank*, 102 Pa. St. 488; *New Orleans Nat. Banking Assoc. v. Wiltz*, 10 Fed. Rep. 330; 4 Woods, 43; *Byron v. Carter*, 22 La. Ann. 98. See *Young v. Vough*, 23 N. J. Eq. 325; *Farmers', etc., Bank v. Wasson*, 48 Iowa, 336; *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308; *Spurlock v. Pacific R.R. Co.*, 61 Mo. 319; *Carroll v. Mullanphy Savings Bank*, 8 Mo. App. 249; *Bank of Holly Springs v. Pierson*, 58 Miss. 421; *Geyer v. Western Ins. Co.*, 3 Pittsb. 41.

⁴ *Rogers v. Huntingdon Bank*, 12 Serg. & Rawle, 77; *Hagar v. Union Nat. Bank*, 63 Me. 509.

general banking law of New York, when the articles of association provided for a lien upon stock until the shareholder's debt to the bank was paid, such a lien was valid and bound the stock, yet a lien could not be created by a by-law in the absence of a provision on the subject in the articles of association.¹ The New York Court of Appeals held that the by-law of a bank was void which declared that no transfer of shares of stock could be made unless the person making the same should previously discharge all debts and demands due or contracted by him or her to the bank, unless by consent of the board of directors; on the ground that the general banking law under which the bank was incorporated provided that the shares should be transferable on the books in such manner as might be agreed upon in the articles of association, and this excluded the right of the directors, who are usually but a small portion of the parties interested and mere agents, to interfere with the transfer by a by-law. The bank in that case was incorporated under the act of 1838,² the language of which was: "The shares of said association shall be deemed personal property, and shall be transferable on the books of the association in such manner as may be agreed on in the articles of association."³ Subsequently it was decided in

¹ Leggett v. Bank of Sing Sing, 24 N. Y. 283; Arnold v. Suffolk Bank, 27 Barb. 424; Rosenback v. Salt Springs Nat. Bank, 53 Id. 495; Conklin v. Second Nat. Bank, 45 N. Y. 655; S. C. 53 Barb. 512.

² Sts. of N. Y. of 1838, p. 249, sec. 19.

³ Bank of Attica v. Manf. & Traders' Bank, *supra*—ALLEN, J., dissenting. DENIO, J., in delivering the opinion of the court, said: "Assuming, without at present deciding, that this provision would allow a restraint to be inserted in the articles of the character of that contained in this by-law, it does not

afford any countenance to the position that it could be contained in any other form. If we concede that the power to determine the manner in which a transfer on the books may be made includes a power to forbid it in a case in which the shareholder is indebted to the association, the act prescribes very distinctly that it is to be contained in the articles. The manner of the transfer, including, according to the assumption, any qualifications or restraint which it may be thought expedient to attach to the right to transfer, is to be such as may be agreed upon, not by a by-law or by any act of the directors,

the same State and by the same court, that power given to a corporation by a statute to make by-laws not inconsistent with any existing law for the management of its property, the regulation of its affairs, and for the transfer of its stock, did not authorize a by-law that no stock should be transferred on the books of the corporation when the person in whose name the stock stood, was indebted to the company without the consent of the president or treasurer, or by a vote of the board of trustees. FOLGER, J., in delivering the opinion, said: "Every by-law made in pursuance of a general or incidental authority must be a reasonable one. It is not a reasonable by-law which, without authority, express or clearly to be implied, interferes with the common rights of property and the dealings of third persons, and prevents the purchase and transfer or delivery of property. It is not insubordination to the constitution and general law of the land, and the rights dependent thereon, for the reason just given. Moreover, if the law is potential, it gives a summary remedy to the defendant unknown to the law, subjecting the stock to what is equivalent to an attachment or an execution without judgment or suit. Hence, if the defendant is to maintain this by-law, it must point out the authority, either in its articles of association, and show that they are authorized by law, or

but in the articles of association. It was not necessary to insert negative words to exclude any other manner of performing the same thing; for, by the common rules of construction, where a matter is authorized to be done in a particular way, every other different method of doing it is excluded. And the difference between a restraint upon alienating the shares in these associations contained in the articles which must receive the assent of all the primary shareholders, and by which all persons holding derivative interests

must be bound, and a like restraint imposed by the agents of the association in the form of a by-law, which may or may not come to the knowledge of the shareholders, and which, if known, may be disapproved of by them, is marked. A person may generally agree by express contract to any qualification of his rights of property not repugnant to the rules of law; but if another person undertakes to attach such qualifications in his behalf, he must show his authority for the act."

in some statute. . . . We think that it is entirely safe to say that the terms of this provision do not give express power to the defendant to enact such a by-law as that relied on. Certainly, the power is not specified therein, nor do we think that the existence of the power can be implied therefrom. It would be an implication in opposition to the policy of the common law, which, as before observed, is against the existence of secret liens. It is also one in opposition to the policy of the law in its particular dealings with this kind of property. Shares of stock are in general personal property, to be dealt with as such, and with as much freedom and ease. The right to them is a chose in action, and though not transferable so as to give the same safety in dealing as is given to a *bona fide* taker of negotiable paper, the current authority in this State is to the protection of the *bona fide* vendee against secret or equitable claims thereto of one who has induced the vendor with the *indicia* of ownership. It is evident that such a by-law as this in question, not made known upon the certificate of stock issued by the corporation, if it is to be upheld, is a very serious hindrance to the ease and safety with which sellers and buyers of shares of stock may deal therewith. It is not a by-law regulating the exercise of a right, merely pointing out or prescribing the manner in which a right may be exerted, so that protection may be mutually secured to the corporation and to incoming stockholders; but it is an abridgment, nay, it may be a destruction, of a right. Now, we do not assert that it is not possible to legally abridge this right. There may be power given by statute so to do. There may be, in some cases, an agreement of the original stockholders among themselves, by their articles of association, that such power shall exist. . . . Of a certainty, it is not to be implied from statutory phrases which may have ample satisfaction in a by-law which shall regulate, without abridging, the exercise of the right. The

statutory provision looks to the effectuating a transfer when the holder of stock has found a purchaser therefor ; but it enables the prescribing of such rules as to the mode, as shall guard the corporation and its actual stockholders, and those intending to become such, against imposition, while they set up no real hindrance to the transfer ; such rules as may easily be complied with by persons who have completed their private bargain. This by-law sets up an obstacle to the transfer unless something is done for the pecuniary benefit of a third party not immediately concerned in the sale and purchase of the shares, which was not contemplated by the parties to the sale, and which one of them is not, upon any abstract rules of justice, bound to do. We do not think that a power so to hinder the act of formal transfer is so plain and necessary an inference from a power to effectuate that act in a prudential manner, as that one can be implied from the other.”¹ A view contrary to the foregoing decision seems to have been taken in several cases. Under a charter empowering the corporation to make by-laws for its better government, and for the management and direction of its trade to Hudson’s Bay, a by-law was adopted, providing that if a member should be indebted to the corporation, his stock in it should, in the first place, be liable for such indebtedness, and that the corporation might seize and detain his stock therefor. It was objected to the by-law, that the corporate stock ought not to be liable to the payment of any one debt in preference to another, and that a by-law could not be made to the prejudice of a third person ; that it was as if copartners, on entering into partnership, should covenant that the stock of each partner should be first liable for the debts he owed the other partner, before the debts he owed to any other person. The Lord Chancellor said : “ This is a good by-law ; for the legal interest of all the stock is in the company,

¹ Driscoll v. West Bradley, etc., Manf. Co., 59 N. Y. 96.

who are trustees for the several members, and may order that the dividends to be made shall be under particular restrictions or terms; and, by the same reason that this by-law is objected to, the common by-laws to deduct the calls out of the stock of members refusing to pay their calls, may be said to be void. As to the other part of the by-law, empowering the company to detain and seize the stock of such member, that is also good; but then there ought to be some act done by the company to order or declare that the stock of such member is seized for the debt due to the said company.”¹ An act incorporating an insurance and banking company, declared that the stockholders in said institution “may make, ordain, and establish such by-laws and regulations as they may deem expedient and necessary to carry into effect the objects of the institution; provided such by-laws, rules, ordinances, and regulations be not repugnant to the laws or constitution of this State, or the United States.” A by-law was adopted that no stockholder who might be indebted to the corporation as payer or indorser on any note or notes lying over and dishonored, should be permitted to transfer his stock; that the company should, in that case, be considered a creditor in possession, and such possession and such dishonored note or notes should constitute a lien on the stock, which should be subject to the payment of such note or notes. It was held that the by-law was valid, and that a purchaser under execution, with notice of the by-law, of the shares of the stockholder indebted to the company, was not entitled to a transfer of the stock so purchased without first discharging the lien.² Under a charter which provided that the

¹ Child v. Hudson's Bay Co., 2 P. Wms. 207. Banks have sometimes provided by a special by-law that all shares of stock shall be deemed hypothecated to the bank for any debt, the bank to hold the shares without any specific pledge. Nesmith v. Washington Bank, 6 Pick. 324; Plymouth Bank v. Bank of Norfolk, 10 Id. 454; Mass. Iron Co. v. Hooper, 7 Cush. 183. See Heart v. State Bank, 2 Dev. & Batt. Eq. 111; Rogers v. Huntingdon Bank, 12 Serg. & Rawle, 77.

² Tuttle v. Walton, 1 Ga. 43. In

stock should be assignable on the books of the corporation under such regulations as the board of trustees should establish, a by-law was held good which declared that no stockholder should be permitted to transfer his stock

this case LUMPKIN, J., in delivering the opinion of the court, said: "It seems to be admitted on all sides that, as between the corporators themselves, a by-law would be good which asserts a lien on the stock of the members for the debts of the company. A provision to this effect is frequently contained in the statutes conferring charters, and is a standing by-law in almost all corporations. Tuttle, the plaintiff in error, purchased at sheriff's sale, with full and explicit knowledge of the existence of this lien. Does it lie in his mouth to contest its validity, or to claim exemption from its operation? I think not. As the judgment creditor and plaintiff in execution, had he discontinued the sale when the notice was given by the bank and gone into equity, as it was clearly competent for him to have done, my impression is that he would have been entitled to a decree for a sale unincumbered by the lien, unless notice could have been brought home to him of the by-law at the time he contracted with Glendenning; or, had he or any one else bought the stock publicly or privately without such notice, theirs, I think, would have been the better equity." NISBET, J., dissenting, said: "To make this by-law and the lien created by it good, notice of the law to the world, and, in this case, notice to Tuttle at the time he gave credit to Glendenning, was indispensable. Without such notice, it is a fraud upon creditors, and void. But this by-law in its terms creates the lien of a creditor in possession to secure a contingent indebtedness—by which is meant, I suppose, a general balance which at any time may be

found due by the stockholder to the company. Creditors in possession at common law have a lien under certain circumstances. The facts of this case do not give the company the position of creditors in possession. The lien of creditors in possession arises in cases where property is placed in possession of an individual or company, upon which labor or expense is to be bestowed by agreement made between the parties or implied in law. The depository has a lien upon it for his labor and expense. Also, in other cases, when a contract is made or implied that the property is to be retained to secure a present or continuously recurring indebtedness. Now, in this case, at the time of making the by-law, there is no labor to be bestowed on or expense to be incurred about the stock. The lien is not claimed on account of either. Nor is there any present indebtedness or running account between the parties. It is admitted that at the time the by-law was made, and at the time Glendenning became a stockholder, he owed the company nothing, nor did he become its debtor until about eighteen months afterward; so that the declaration in the by-law that the company shall be a creditor in possession does not in fact make them so. They cannot be by their own act remitted to the rights of a creditor in possession; on the contrary, the facts in the case show the by-law to be repugnant to those principles of the common law which recognize the lien of creditors in possession, and is on that account void. Nor can this be looked upon as a pledge of stock which creates a lien upon it. Pledges may

while he was indebted to the company. COLLIER, C. J., said: "The by-law in question is in conformity to the charter and dictated by expediency. It is calculated to enable the stockholders to obtain accommodations from the trustees upon security less satisfactory than the trustees would advance upon if the stock of members was not pledged for their individual indebtedness. And so, much as it restricts the transfer of the stock, probably to an equal or greater extent does it facilitate the obtaining of money by the stockholders, and thus adds to the capital actively employed; so that the inconvenience which results from such a by-law, so far as the public is concerned, is entirely neutralized by the private as well as public benefit which proceeds from it."¹ The charter of an insurance company declared that the shares should be assignable and transferable on the books of the company or otherwise, according to such rules and by-laws and subject to such restrictions and limitations as the stockholders at a regular meeting might from time to time adopt. It was held that the company had power to pass a by-law prohibiting a stockholder, in any way indebted to the company or liable for the indebtedness of another, from assigning and transferring his stock, except by

create a lien to secure precedent or contemporary debts, or existing debts and future advances. But I believe no case can be found of a lien created by pledge without an existing debt to secure payment of a future debt which may or may not exist. The same doctrine holds as to mortgages, only with greater strictness. There can be no mortgage without a present indebtedness, or liability on the part of the mortgagee for the mortgagor. And, although a mortgage may be good for debts to be contracted as well as for debts due, yet notice of such intent between the parties has been held necessary."

¹ *Cunningham v. Ala. Life Ins. &*

Trust Co., 4 Ala. 652. In *McDowell v. Bank of Wilmington*, 1 Harr. Del. 27, on the question whether the by-law of a bank giving the bank a lien on stock for the debts of the holder was valid, the court said: "It does not affect other than members of the corporation, whose privilege and duty it is, before they become such, to acquaint themselves with the rules of the institution, so far as they would affect their interests. In reference to the institution, it is a very salutary rule, greatly to the security and advantage of the stockholders and the public, by facilitating loans. It is, therefore, in our opinion, a valid by-law."

the special permission of the directors; that the company would have had such power in the absence of any provision in the charter on the subject; that the company had a lien on the stock for the indebtedness of a firm of which the stockholder was a member, and that such lien was not lost because the company's right of action for the partnership indebtedness was barred by the statute of limitations.¹

The language of the charter may of course be such as to leave no doubt of the power of the corporation to create a lien on its shares. Where the act of incorporation provided that the company might make by-laws for the management of its property, the regulation of its affairs, and the transfer of its stock, and that the stock should be transferable in such manner as should be prescribed by the by-laws, it was held that the corporation was authorized to adopt a by-law that a stockholder on the corporate books should not be entitled to have his stock transferred, until he had paid all of his indebtedness to the corporation.²

¹ Geyer v. Western Ins. Co., 3 Pittsb. 41.

² Pendergast v. Bank of Stockton, 2 Sawyer, 108. See Nat. Bank v. Watson-town Bank, 105 U. S. 217; Kahn v. Bank of St. Joseph, 70 Mo. 262; First Nat. Bank v. Hartford, etc., Ins. Co., 45 Conn. 22; Bishop v. Globe Co., 135 Mass. 132; Pittsburgh, etc., R.R. Co. v. Clarke, 29 Pa. St. 146. A number of the authorities hold that where power is given to a corporation to regulate the transfer of stock, it may adopt a by-law providing that the transfer shall be made on the books, and that in that case the title of a purchaser, before entry on the books, although good as between him and the vendor, is not a legal, but merely an equitable title, and, being only an equity, will be subject to the prior equity of the corporation. See Union Bank of Georgetown v. Laird, 2 Wheat. 390; Arnold

v. Suffolk Bank, 27 Barb. 424. Where the charter declared that the stock should be assignable according to such rules, and subject to such regulations as the directors should establish, and a by-law provided that no transfer would be valid unless made on the books, it was held that the purchaser, before recording, took only an equitable title, subject to any prior equity of the company. Stebbins v. Phoenix Ins. Co., 3 Paige, 361. See comments of ALLEN, J., on this case in Bank of Attica v. Manf. & Traders' Bank, 20 N. Y. 512. By the charter of a bank, the stock was made transferable in such manner as the by-laws should direct. The by-laws provided, and the certificate expressed, that it was transferable on the books on surrender, etc. The court, after a full examination of the nature of bank stock and certificates, and comparing the latter with bills of lading,

The word "indebted," when employed in a by-law or charter, restraining a stockholder from transferring his stock while indebted to the corporation, applies as well to debts to become due, as to those which are actually due, and as well to those owing by the stockholder as surety or indorser, as to those in which he is the principal debtor.¹ In common acceptation, a debt is due and payable to a person though the time of payment has not elapsed.²

§ 81. **Lien created by usage or agreement.**—A course of usage—an understanding—a contract express or implied, may constitute a lien and a law to the parties, provided they are not repugnant to the charter or the laws of the land. A stockholder of a bank who creates a debt to the bank, with notice of a usage that shares will not be transferred while the holder is indebted to the bank, is bound by such usage, as are also his assignees, under a voluntary general assignment; custom giving a lien independently of any by-law. In *Waln v. Bank of North America*,³ it appeared that Waln was a stockholder and had been a director of the bank; that he was legally indebted to the corporation, and

exchequer bills, etc., said that the corporation had the right so to frame the certificate, that it should not be negotiable in the commercial sense so as to give the purchaser a title superior to the vendor; but that this would not prevent the owner from selling outside, so that the vendee could acquire in equity the equity of the vendor. *Mech. Bank v. New Haven R.R. Co.*, 13 N. N. 622, 624, 626. In *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149, Goodfellow was assignee for value. By the charter, the stock was transferable according to such rules and restrictions as the directors should establish. They made a by-law prohibiting any transfer by a person indebted to the company; and the certificate stated that the stock was transferable

on the books conformably to the charter and by-laws. The court, while it held the assignment good between the vendor and vendee, and that it conveyed all the vendor's right to the vendee, held that the words of the charter justified the by-law, and that what was sufficient to put the purchaser upon inquiry was notice to him.

¹ *St. Louis Perpetual Ins. Co. v. Goodfellow*, *supra*.

² "We speak of debts due and payable to us, without thinking of the time of credit. We secure a debt due by mortgage, though it have years to run." *WRIGHT, J.*, in *Downer v. Zanesville Bank*, *Wright, Ohio Rep.* 477.

³ 8 *Serg. & Rawle*, 73, referred to by *BALDWIN, J.*, in *Brent v. Bank of Washington*, 10 *Pet.* 596.

made a general assignment, including his bank stock, for the benefit of his creditors, although he knew at the time his indebtedness was incurred that there was a usage of the bank not to permit a transfer of stock while the holder owed the bank. The court said : " The stock passed into the hands of his assignees, subject to all the rights and all the equities of the bank ; and this without taking into consideration the evidence of at least the knowledge of one of the plaintiffs of the restriction on transfers where the stockholder was debtor to the bank. It is reduced to the narrow question, was this regulation of the bank—this usage to retain—this course of dealing between the bank and her customers, unquestionably known as it was to Mr. Waln, binding on him ? " The certificate of stock of a bank recited that the stock was transferable at the bank, subject, nevertheless, to the holder's indebtedness and liability to the bank, according to the charter and by-laws. There was, however, nothing, either in the charter or by-laws, in relation to the liability of stockholders. But the charter authorized the stockholders to establish by-laws and regulations for the well-ordering of the concerns of the bank, and to make the stock transferable according to its rules. It was held that although no by-law had been adopted on the subject, yet, as the condition was in the certificate of stock, it must be considered that the stock was issued and received upon such condition, constituting one of the terms of the contract upon which the stock was acquired, and that it was a valid restriction on that ground. It appeared that the same form of certificate had been used by the bank about fifteen years.¹ The articles of association of a national bank provided that the board of directors should have power to make all by-laws which it might be proper and convenient for them to make under the act for the general regulation of the business of the association and the management and

¹ Van Sands v. Middlesex Co. Bank, 26 Conn. 144.

administration of its affairs, which by-laws might prohibit, if the directors should so determine, the transfer, without the consent of the board, of stock owned by any stockholder who was liable to the association, either as principal debtor or otherwise. The directors adopted the following by-law: "No transfer of the stock of this bank shall be made without the consent of the board of directors, by any stockholder who shall be liable to the bank, either as principal debtor or otherwise, and certificates of stock shall contain upon them notice of this provision." It appeared that prior to the bankruptcy of D., who was one of the original corporators, he was the owner of a certain number of shares of the capital stock of the bank for which he held certificates in the usual form, with the following notice printed on their face: "And provided that no transfer of the stock herein certified shall be made, without the consent of the board of directors, while the owners shall be liable to the bank, either as principal debtor or otherwise"; that at and previous to the filing of D.'s petition in bankruptcy the bank was the holder and owner of a bill of exchange remaining unpaid, of which D. was the last indorser, and which, before the filing of his petition, had been dishonored and duly protested, and notice given to D.; and that D. afterward indorsed and delivered to his assignee in bankruptcy the certificates of stock, and that the latter demanded of the proper officer of the bank to have the stock assigned in the regular way on the books, who refused. It was held that the by-law, with the provision on the same subject in the articles of association, must be considered as a contract between all the stockholders and the corporation, and created a lien on D.'s stock for the debt due by him to the bank.¹

¹ *In re Dunkerson*, 4 Biss. 227. See *politan Nat. Bank*, 2 Biss. 527; *Conklin v. Second Nat. Bank*, 45 N. Y. 202; *Evansville Nat. Bank v. Metro-* 655.

§ 82. **Lien under the National Currency Act.**—Unless the act of Congress providing for the creation of national banking associations, or the articles of association, expressly authorize the directors by a by-law to make the stock of any of its stockholders subject to a lien in favor of the bank as security for a debt due by him to the bank, no such lien can be created.¹ Section 25 of the national currency act of 1863 provided that the banks should have a lien upon the stock of each shareholder for all debts and liabilities from him to the bank unpaid, and that no transfer of the stock of the bank should be valid until all of the debts and liabilities of the shareholder making the transfer were paid, and that this provision should be inserted in substance in the certificates of stock issued by the bank. Section 21 provided that certificates of stock, signed by the president and cashier, might be issued to stockholders, and that the certificates should state on their face that the stock was transferable only on the books of the bank. A lien was thus given to all banks organized under the act upon the shares of each stockholder for all debts and liabilities to the banks. But the act of 1863 was repealed by the 62d section of the currency act of 1864, passed June 3d of that year;² and the foregoing provisions of the act of 1863 giving a lien to a bank upon the stock for any debt or liability of a stockholder were not re-enacted.³ In *Bank v. Lanier*,⁴ it appeared that a bank had been organized under the act of 1863, and that it had adopted a by-law that the stock of

¹ *Rosenback v. Salt Springs Nat. Bank*, 53 Barb. 495.

² 13 U. S. Sts. at Large, 99.

³ See opinion of GROVER, J., in *Conklin v. Second Nat. Bank*, *supra*. In *Lockwood v. Mech. Nat. Bank*, 9 R. I. 308, it was held that the power given to a national bank under the national currency act of Congress of 1864, ch. 106, to make by-laws to regulate the management of the business and the mode of trans-

ferring stock, was sufficient to justify a by-law creating a lien on the stock, and providing that the stock should be transferred only at the bank on the books, and that until such transfer the purchaser would take only an equitable not a legal title, subject to any claim of the bank by charter, by-law, usage, or agreement.

⁴ 11 Wall. 369.

the bank should be transferable only on its books, subject to the provisions and restrictions of the act of Congress that no shareholder should have power to sell or transfer any share so long as he should be liable to the bank for any debt due and unpaid. The suit was brought against the bank for refusing to permit a transfer of stock, to which it set up the defense that the stockholder was indebted to it, and that under the by-law he had no right to make the transfer. The court said: "Congress evidently intended, by leaving out of the act of 1864 the 36th section of the act of 1863, to relieve the holders of bank shares from the restrictions imposed by that section. The policy on the subject was changed, and the directors of banking associations were in effect notified that thereafter they must deal with their shareholders as they dealt with other people. As the restrictions fell, so did that part of the by-law relating to the subject fall with them." A national bank, in pursuance of one of its articles of association, adopted a by-law that all debts actually due and payable to the bank by a stockholder, as principal debtor or otherwise, requesting a transfer, should be made unless the board of directors permitted it to be done; and that no person indebted to the bank should be allowed to sell or transfer his stock without the consent of a majority of the directors, whether liable as principal or surety, and whether the debt or liability was due or not. The judges of the United States Circuit Court differing in opinion, certified to the Supreme Court the question whether a national bank, organized under the act of Congress of 1864, could acquire a valid lien by the articles of association or by-laws upon the shares of its stockholders. This question was answered in the negative.¹

¹ Bullard v. Bank, 18 Wall. 589, approving Bank v. Lanier, *supra*, CLIFFORD, J., dissenting; S. P. Evansville Nat. Bank v. Metrop. Nat. Bank, *supra*; 10 Am. L. Reg., N. S. 774; Bank of Louisville v. Bank of Newark, Ky., Ct. of Ap. 7; Chicago Legal News, 70. In Pennsylvania the old bank charters provided that no stockholder indebted to a bank for a debt due and unpaid

§ 83. **Restraining transfer of stock.**— A by-law requiring any extraordinary formality, or imposing an impediment in the transfer of shares, would be void.¹ It “may regulate, in a reasonable manner, the exercise of a right, or the internal affairs of a corporation, or the conduct of its members, or the mode by which a person is to be admitted to the exercise of a right to which he has an inchoate title; but it cannot take away a right, or impose any unreasonable restraint on the exercise of it.”² A by-law which limits the transfer of the stock to be made only personally, or by attorney, and with the assent of the president, is in restraint of trade, and contrary to the general law, which permits the right to personal property and incorporeal hereditaments, to be transferred in various other modes.³ The power to dispose of stock, like the power to dispose of other property, is incident of common right to the ownership of it; and the words of a charter, “transferable on the books of the company,” are treated as merely cumulative, pointing out one mode of transfer, but not excluding other modes where no exclusive words are used. The legislature may grant corporate power to restrain this transferability, but unless the power is expressly given, it does not exist; and the courts generally construe clauses affecting the right of disposal, with a view to the particular purpose for which they are inserted, and give them effect to that extent only. This power of regulating transfers of stock confers no corporate authority to control its transferability by prescribing to whom the owner may sell, and to whom not, or upon what terms. Such a provision is regarded as being exclusively for the benefit of the company in order that it may,

should make a transfer, or receive a dividend, until such debt was discharged. *Bank of Ky. v. Schuylkill Bank*, Parson's Sel. Cas. 180, per KING, P. J.; *Grant v. Mechanics' Bank*, 15 Serg. & Rawle, 143.

¹ *Bank of Ky. v. Schuylkill Bank*, Parson's Sel. Cas. 180.

² 2 Kyd on Corp. 122.

³ *Sargent v. Franklin Ins. Co.*, 8 Pick. 90. See *Nesmith v. Washington Bank*, 6 Pick. 324.

by proper regulations, have the means of knowing who it is bound to treat as members liable to assessment, and entitled to vote at corporate meetings, and to receive dividends.¹ Where a by-law provides that no transfer or assignment of stock shall be valid unless made on the books of the company, the legal title will not pass until such transfer takes place, and a purchaser, without such transfer, takes the stock subject to any equitable claim which may exist against it either in favor of the company or any other person. The case would be different if there were no by-law regulating the transferring of shares, and the charter declared the stock assignable. In such case, a simple assignment signified to the proper officer of the corporation, although not entered on the company's books, would be sufficient to transfer the legal right, and a *bona fide* assignee of the stock would hold the same free from any equitable claims thereon of which he had no previous notice.² But, as between vendor and vendee, a transfer of stock will be valid, though the act of incorporation provides that no such transfer shall be valid or effectual until registered in a book kept for that purpose and the debts due the company are first paid; the transfer conferring upon the purchaser all the right the seller had.³ Such a regulation being simply intended as a means of enforcing payment of debts due the corporation.⁴ Where the act of incorporation prescribes the mode of transferring stock, or authorizes the company to do it in their by-laws, and the company in their by-laws prescribe a mode as the only one to be pursued, that mode must be followed, or the legal title will not pass by an assignment which would be good at common law had no

¹ Chouteau Springs Co. v. Harris, 20 Mo. 382.

² Stebbins v. Phoenix Fire Ins. Co., 3 Paige Ch. 350.

³ Bank of Ky. v. Schuylkill Bank, *supra*. *Contra*, Marlborough Manf. Co. v. Smith, 2 Conn. 544; 5 Id. 246;

Northrop v. Newtown Turnpike Co., 3 Id. 544; Oxford Turnpike Co. v. Bunnel, 6 Id. 552.

⁴ Hodges v. Planters' Bank, 7 Gill & Johns. 306; Hall v. U. S. Ins. Co., 5 Gill, 484.

particular and exclusive mode of transfer been prescribed.¹ When, however, the by-laws prescribe a particular form of transfer, it is not essential to the passing of the property, as between the parties, that the form should be strictly followed, it being an arrangement of the corporation for its own convenience, and so far binding upon purchasers that they cannot compel the payment of dividends, or insist upon certificates, without applying to have a transfer made conformably to the by-laws.² Although the charter does not prescribe a form of transfer of shares on the books of the company, yet a by-law which goes beyond it by subjecting the stockholder to the use of a specified form, is not for that reason invalid.³ The obligation to surrender the old certificate is not a limitation on the power of permitting transfers. It is a provision introduced for the security of the corporation in order to prevent its being embarrassed between legal and equitable titles to its stock, and in order to secure to the corporation any liens or claims on its stock before transfer to third persons having no notice of such liens or claims.⁴

A corporation may, by its conduct, deprive itself of the right to withhold the transfer of shares. M., being the owner of stock in a bank, applied to B. for a loan of \$700, proposing to pledge his stock as security therefor. B. went to the bank to ascertain whether he might safely loan the money on the stock. The officer in charge of the bank assured him that the stock was free from incumbrance, and that he might safely take it as security for the contemplated loan. B., acting on this assurance, loaned M. the above-

¹ *Colt v. Ives*, 31 Conn. 25; *Union Bank v. Laird*, 2 Wheat. 390; *McEuen v. West London, etc., Co.*, L. R. 6, Ch. 655; *Sayles v. Blane*, 19 L. J. Q. B. 19. See *Helm v. Swigett*, 12 Ind. 194; *Pennsylvania R.R. Co.'s Appeal*, 86 Pa. St. 80; *Bank of Commerce's Appeal*, 73 Id. 59; *Planters', etc., Mu.*

Ins. Co. v. Selma Savings Bank, 63 Ala. 585.

² *Sargent v. Essex R.R. Corp.*, 9 Pick. 201; *Bank of Utica v. Smalley*, 2 Cowen, 770.

³ *Northrop v. Curtis*, 5 Conn. 246.

⁴ *Bank of Ky. v. Schuylkill Bank*, *supra*.

mentioned sum, and took his note at four months and a transfer of the stock to a trustee to secure the loan, with power to sell the stock for payment of the debt, and afterward extended the time on the note four months longer. M. failing to pay his note at maturity, the trustee sold the stock, and B. bought it for \$600, and entered a credit for the amount of the note. B. offered to pay all assessments on the stock, and requested the bank to have the stock issued in his name, or transferred on the books of the bank to him; which the bank refused to do, on the ground that the stock was retained, at the time B. took it, for debts due the bank from M., and had been forfeited therefor under the by-laws. It was held that the bank, after it had induced B. to part with his money, was estopped to forfeit the stock for unpaid dues.¹

§ 84. How by-laws may be proved.—An officer of the corporation cannot be admitted to testify as to what the by-laws are, and the authority conferred by them. That is to be ascertained by the production of the by-laws themselves.² The charter and by-laws of an insurance company, though not set out in the pleadings, may be proved by printed copies attached to a policy of insurance, where it appears that the policy was accepted by the defendant.³ If there is no record, or the record is deficient, the enactment of a by-law may be inferred from facts proved;⁴ and even without a by-law, a regulation, practice, or usage may be good.⁵ A by-law of a bank informally adopted may be afterward ratified, and, without any record of adoption, may be proved by the usage and acts of the bank, and of parties dealing

¹ *Moore v. Bank of Commerce*, 52 Mo. 377.

² *Lumbard v. Aldrich*, 8 N. H. 31. The books of the corporation in which the by-laws are registered, are admissible for this purpose. *Case of Thetford*, 12 Vin. Abr. 90.

³ *Atlantic Mu. Fire Ins. Co. v. Sanders*, 36 N. H. 252.

⁴ *Reuter v. Telegraph Co.*, 6 Ell. & Bl. 341; *Union Bank of Md. v. Ridgely*, 1 Harr. & Gill, 413; *Lockwood v. Mech. Nat. Bank*, 9 R. I. 308.

⁵ *Wain v. Bank of North Am.*, 8 Serg. & Rawle, 73.

with it.¹ An officer of a corporation will be presumed to have knowledge of by-laws adopted previous to his appointment.² As a rule, persons dealing with the agents and officers of a corporation are chargeable with notice of the authority conferred upon them ; and when the authority is specifically given in the by-laws, it cannot be inferred by virtue of an office.³

§ 85. **How far binding.**—Where the act of incorporation does not require its clerk to be sworn, and notwithstanding the corporation, for its own security, adopts a by-law providing that he shall take an oath, it is only directory, and not an indispensable qualification.⁴ The by-laws are evidence to show the liability of an officer whose duties are prescribed thereby, although he is not a corporator and had no vote in their adoption.⁵ A by-law of a mutual insurance company, constituting the surveyor of the company the agent of the insured, is binding on a member, and the company is not liable by reason of error in the survey, or its not complying with the by-laws.⁶ The office of a by-law is to regulate the conduct and define the duties of the members toward the corporation, and between themselves. So far as its provisions are in the nature of a contract, the parties thereto are the members of the association, or the corporation upon the one side, and its individual members upon the other. The right of any third party, stranger to the association, to establish a legal claim through such a by-law, must depend upon the general principles applicable to express contracts. Where, to become a member of an association, it was necessary to subscribe the by-laws, and

¹ Lockwood v. Mech. Nat. Bank, *supra*.

² Hunter v. Sun Mu. Ins. Co., 26 La. Ann. 13; 5 Am. Corp. Cas. 403. A member of a municipal corporation is presumed to have knowledge of its by-laws. *Inhabs. of Palmyra v. Morton*, 25 Mo. 593.

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³ *Adriance v. Roome*, 52 Barb. 399.

⁴ *Hastings v. Blue Hill Turnpike Corp.*, 9 Pick. 80.

⁵ *Bank of Wilmington v. Wollaston*, 3 Harr. Del. 90.

⁶ *Susquehanna Mu. Ins. Co. v. Perrine*, 7 Watts & Serg. 348.

one of the by-laws recited that the members of the association pledged themselves, in their individual as well as collective capacity, to be responsible for all moneys loaned to the association, but it did not appear that a party's signature was attached for any other purpose than to constitute him a member of the corporation, and it was not alleged that the plaintiff lent his money upon the faith or credit of the individual pledge contained in the by-law, nor that the by-law was in any manner made known to him, or the public, as the basis of such credit, it was held that the member was not personally liable to the lender. If such a pledge were made, however, for the purpose of enabling the corporation to obtain a loan upon the faith of it, and used for that purpose, it might give a right of action against the subscribers in favor of a party who had been induced to advance money upon its credit.¹ If a corporation neglect to give special notice of a by-law pursuant to a general statute on the subject, it is not binding on a person who has not actual notice of it; it being different from the case of a violation of law, of which every one is bound to take notice.² To render the by-laws of a railroad company binding on travelers, knowledge of the by-laws must be brought home to them by notice.³ Notwithstanding a by-law of a bank that all payments made and received must be examined at the time, a dealer with the bank may subsequently show a mistake.⁴ The directors of a business association cannot be held by members to a strict discharge of all of the duties prescribed for them in the by-laws, when such duties are mainly entrusted by the association to an agent, and the members know how the business is conducted, and acquiesce.⁵ It

¹ *Flint v. Pierce*, 99 Mass. 68, per WELLS, J., referring to *Mellen v. Whipple*, 1 Gray, 317; *Field v. Crawford*, 6 Id. 116; *Dow v. Clark*, 7 Id. 198. See *Free Schools in Andover v. Flint*, 13 Metc. 543.

² *Worcester v. Essex Merrimac Bridge Corp.*, 7 Gray, 457.

³ *Gt. Western R.R. Co. v. Goodman*, 11 Engl. L. & Eq. 546.

⁴ *Mechanics' Bank v. Smith*, 19 Johns. 115.

⁵ *Henry v. Jackson*, 37 Vt. 431.

will not affect the validity of a deed of trust made by a corporation, that the meeting of the board of directors at which the president of the corporation was authorized to execute such an instrument, was held without the notice prescribed for such meetings by the by-laws. In a case of this kind, the by-law is a mere guide for the convenience of the board, and for the orderly conduct of its business. It cannot be extended to affect the validity of acts of the directors done in disregard of it when third parties are concerned.¹

§ 86. **How construed.**—The charter and by-laws of a corporation, like every other constitution and all other laws, should receive such a construction as to effectuate the intention of the framers; and the intention must be determined by the words used in reference to the subject matter, and the circumstances of each particular corporation.² A clause in a by-law that “all meetings” of the company shall be notified by the clerk, will be construed as referring only to special meetings.³ Where, by the act incorporating a manufacturing company, the shares were to be transferred on the books of the company in such manner as the directors should prescribe, and a by-law provided that transfers of stock should be made by assignment in the treasurer’s book, either in person or by attorney, on surrender of the certificate and a new certificate given, it was held that there must be a written assignment on the treasurer’s book, subscribed by the assignor or his attorney, to constitute a transfer of the stock.⁴ Under an act of incorporation the shares were to be transferable only on the books of the company in such manner as the by-laws should direct. The by-laws provided that the board of directors should prescribe the form of transfer to be registered by the clerk

¹ Samuel v. Holladay, Woolw. 400;

² Ibid.

S. C. McCahon, Kans. 214.

³ Warner v. Mower, 11 Vt. 385.

⁴ Marlborough Manf. Co. v. Smith, 2 Conn. 579.

on the books of the company, and a transfer was not otherwise to be valid. It was held that the assignment was to be copied at full length on the books of the company, and that a mere deed or writing on which the clerk entered "*received for record*," was not sufficient.¹ The meaning of a provision in a by-law that shares shall be transferable by indorsement in writing, and subscribed by the holder in presence of the cashier, or two other witnesses, is not only that the holder of the stock shall indorse the certificate of stock when either the cashier or two other witnesses are present, but that he or they shall subscribe their names thereto in attestation of that fact.² The act incorporating certain banks provided that the stock should be assignable and transferable on the books of the corporation only, and in the presence of the president or cashier, in such manner as the by-laws should ordain; but that no stockholder indebted to the bank should make a transfer or receive a dividend until such debt was discharged, or security to the satisfaction of the directors given for the same. It was held that the general understanding, as well as the obvious meaning of this clause, was, that if a transfer was permitted to be made on the books of the bank, the person to whom the stock was transferred would hold it discharged from any lien for debts due the bank. The security was put into the hands of the bank. No transfer could be made unless its officers produced the books and permitted the transfer; if it did permit it, the lien of the bank was gone.³ With respect to what constitutes a fran-

¹ Northrop v. Newtown, etc., Turnpike Co., 3 Conn. 544. See Oxford Turnpike Co. v. Bunnel, 6 Id. 552.

² Dane v. Young, 61 Me. 160; 4 Am. Corp. Cas. 425.

³ Sewall v. Lancaster Bank, 17 Serg. & Rawle, 285. The by-laws of a company which prohibit any transfer except upon the books of the company, and

upon notice, and sometimes all transfers, unless a certain number of days intervene before an election, have reference either to the right of voting, or the security of the company by way of lien upon the stock for any indebtedness of the stockholder, and do not incapacitate such stockholder from parting with his interest. As already stated,

chise, where a by-law of a railroad company provided that no contract should be made involving the franchise of the road, unless the same was approved by a general meeting representing a majority of the stock after being recommended by a majority of the stockholders, it was held that although a lease of the road did not involve the essential franchise of the company to be a corporation, yet in authorizing the taking of tolls upon the road, it did involve a franchise within the meaning of the by-law.¹ A by-law is not void for uncertainty as to the amount of a penalty which provides that "every person refusing an office shall forfeit and pay the sum of five pounds or less at the discretion of the master and wardens for the time being, so it be not less than forty shillings."² A by-law of a city authorizing the infliction of a penalty not exceeding fifty dollars was held void for uncertainty, and also because it permitted the corporation to be a judge in its own case.³ But afterward the same court, in overruling the previous decision, said: "That the corporation is made judge in its own case is no objection, since it applies equally whether the penalty is for a specific sum, or fixed within certain limits. The question whether the ordinance has been violated, is to be determined in either case by the corporation. The penalty is any sum less than fifty dollars. A reasonable discretion is given to be exercised within certain limits, and we can see no objection which could be urged to such a by-law, which could not, with equal propriety, be made to any law investing courts or juries with discretion in apportioning the fine to the offense, being restricted within reasonable bounds."⁴

§ 87. How validity of by-law determined.—Whether a by-

the purchaser acquires the right of property which the seller had. *Gilbert v. Manchester Iron Manuf. Co.*, 11 Wend. 627.

¹ *Stevens v. Davison*, 18 Gratt. 819.

² *Piper v. Chappell*, 14 M. & W. 624.

³ *Mayor, etc., of Mobile v. Yuille*, 3 Ala. 137.

⁴ *Huntsville v. Phelps*, 27 Ala. 55.

law be in conflict with the law, or the charter of the corporation, or be unreasonable and therefore unlawful, is a question for the court. All regulations of a company affecting its business, which do not operate upon third persons, nor in any way affect their rights, are properly speaking by-laws of the company, and may come within the operation of the principle. Within this limit it is the peculiar and exclusive office of the court to decide upon the validity of the regulation.¹ Where no question is made that the by-law is unreasonable, against law, or contrary to public policy, the court must construe and give effect to the by-law in the same manner, and upon the same principle, that it would construe and give effect to an agreement in writing entered into between private individuals. But if the language is doubtful, or the intention not clearly expressed, and the ambiguity is such that it may be explained by other evidence, or if the meaning of the terms used is to be ascertained and determined by extrinsic proof, the construction is usually a question of fact for the jury.²

¹ *State v. Overton*, 4 Zab. 435. As by members of their certificates, see to validity of by-law in relation to sale *People v. Miller*, 39 Hun, 557.

² *State v. Conklin*, 34 Wis. 21.

CHAPTER VII.

C O R P O R A T E S E A L .

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§ 88. **History.**—Evidence of the use of seals is said to have been found among Assyrian and Babylonian remains, and the practice of authenticating written instruments in that way is extremely ancient. “Among such methods used in Egypt at a very early period were engraved stones pierced through their length with and hung by a string or chain from the arm or neck or set in rings for the finger. The most ancient form used for this purpose was the *scarabæus*, formed of precious or common stone, or even of blue pottery or porcelain, on the flat side of which the inscription or device was engraved. Cylinders of stone or pottery bearing devices were also used as signets. But in many cases the seal consisted of a lump of clay impressed with the seal and attached to the document, whether of papyrus or other material, by strings.”¹ We read in the Bible² that Jezebel, wife of Ahab, “wrote letters in Ahab’s name and sealed them with his seal, and sent the letters unto the elders and to the nobles that were in his city

¹ Smith’s Dict. of the Bible.

² 1 Kings, ch. 21, v. 8.

dwelling with Naboth." King Ahasuerus said: "Write ye also for the Jews, as it liketh you, in the king's name, and seal it with the king's ring; for the writing which is written in the king's name and sealed with the king's ring may no man reverse."¹ "And I bought the field of Hanameel mine uncle's son, that was in Anathoth, and weighed him the money, even seventeen shekels of silver. And I subscribed the evidence, and sealed it, and took witnesses, and weighed him the money in the balances. So I took the evidence of the purchase, both that which was sealed according to the law and custom and that which was open."² From the East seals were introduced into Greece and thence into Rome. Under the Roman law they are said to have been required "on the part of the witnesses at least at the attestation of every instrument."³ The sealing of deeds is said to have been in vogue on the continent of Europe as early as the ninth century.

In England sealing was not in common use previous to the Norman conquest; the method of the Saxons being for such as could write to subscribe their names, affixing thereto the sign of the cross; and for those who could not write, simply to sign by a cross, from which ancient custom was derived the modern practice of the execution of written instruments by the illiterate by making their mark. The oldest authentic sealed charter in England is said to be that of Edward the Confessor to Westminster Abbey in the eleventh century. At the Conquest waxen seals were introduced by the Norman lords.⁴ Seals were first only employed by the kings and nobles, but the use of seals finally became general.⁵

§ 89. **At common law.**—The ancient doctrine was, that a corporation could only manifest its intentions by its com-

¹ Esther, ch. 8, v. 8.

² Jeremiah, ch. 32, vs. 9, 10, and 11.

³ 2 Blk. Com. 305.

⁴ Ibid. See Wood's Civ. L. 133.

⁵ New Am. Cycl., tit. *Seal*; 2 Bouv. Inst. 392.

mon seal. It was said that though the particular members might express their private consent to any acts by words, or by signing their names, yet that this did not bind the corporation; that it was the fixing of the seal, and that only, which united the several assents of the individuals who composed the community, and made one joint assent of the whole.¹ It being incident to every corporation aggregate to have a common seal, the absence of it was held to be a material element in deciding on the validity of the claim to be a corporation by a body which had always been reputed to be incorporated, though it does not appear to have been of itself decisive against such claim.² The English courts still seem reluctant to abandon the idea that a corporation can enter into ordinary contracts in any other way than by its common seal. It was said in one case in support of the strict common law rule that "the seal is required in authenticating the concurrence of the whole body corporate. If the legislature, in creating a body corporate, invests any member of it either expressly or impliedly with authority to bind the whole body by his mere signature or otherwise, then undoubtedly the adding of a seal would be matter purely of form and not of substance. Every one becoming a member of such a corporation knows that he is liable to be bound in his corporate character by such an act, and persons dealing with the corporation know that by such an act the body will be bound. But in other cases the seal is the only authentic evidence of what the corporation has done or agreed to do. The resolution of a meeting, however numerous attended, is, after all, not the act of the whole body. Every member knows he is bound by what is done under the corporate seal, and by nothing else. It is a great mistake, therefore, to speak of the necessity of a seal as a relic of ignorant times. It is no such thing. Either a seal, or some substitute for a seal, which by law should be

¹ 1 Blk. Com. 475.

² Rex v. Lord Dacres, Dyer, 81 a.

taken as conclusively evidencing the sense of the whole body corporate, is necessarily inherent in the very nature of a corporation."¹ Where the plaintiff had been retained by a corporation as attorney to conduct its suits, and to transact other legal business, but had not been appointed under the corporate seal, it was held that he could not recover his bill of costs.² In another case, the plaintiff having, pursuant to an agreement, not under seal, with a railroad company, done certain work on the line of its railroad, and been dismissed before the completion of the job, it was held that he could not recover for the services rendered.³ Some of the earlier American cases manifested great hesitation in admitting the power of an agent to bind a corporation by a specialty unless he had authority from the corporation to affix its common seal; and if this were not expressly proved, the least that would show an implied authority for that purpose was supposed to be that the officer affixing the seal had the custody of the corporate seal.

The rule of the common law on the subject originated at a time when seals were more used by natural persons in the execution of contracts than at present, and when the seals of natural persons as well as of corporations contained devices significant of the person to whom they belonged, and when the seal itself affixed to an instrument was equivalent to signing. It was, therefore, important that when corporations executed an instrument, it should be done by the common and ordinary seal of the corporation; and many of the English cases, and some of the earlier or exceptional cases in the American books, seem to go upon the ground that a corporation cannot seal except by the use of its com-

¹ Mayor, etc., of Ludlow v. Charlton, Co., 5 Exch. 442. See Sutton v. Spectacle Makers' Co., 12 W. R. 742; 6 Mees. & Welsb. 815, per ROLFE, B.

² Arnold v. Mayor of Poole, 4 M. & Gr. 860. Mayor of Kidderminster v. Hardwich, L. R. 9, Exch. 24.

³ Diggle v. London & Blackwell R.R.

mon seal.¹ In *Taylor v. Dulwich Hospital*,² it was said by the Lord Chancellor: "As to the signing of private persons, namely, the master, warden, and fellows, that cannot be such a contract as binds the college; for a contract to bind that, or indeed any corporation, as to its revenue, must be under the common seal. It is true there would have been some equity if the intestate had, after this order for a new lease at the old rent, laid out money in improving or building on the premises in confidence and reliance on such order. However, even in that case, he should have had reparation only from the private persons signing the order, not against the college."

§ 90. **Modern English rule.**—Some of the early cases recognize the difficulty of attempting to enforce the strict common law rule in transactions of minor importance.³ In England, the great increase in the number of corporations has rendered it necessary there, in the absence of any statute making a seal essential to the validity of a particular agreement, to hold many contracts made by and with cor-

¹ See *Bank of Middlebury v. Rutland & Wash. R.R. Co.*, 30 Vt. 159.

² 1 P. Wms. 655.

³ See *Horn v. Ivy*, 1 Vent. 47; *Rundle v. Deane*, 2 Lut. 1496; *Manby v. Long*, 3 Lev. 107. Grant, in his work on Corporations, 62, 63, says that "the rule appears to have been restricted in former times, by the qualification that a corporation, to be entitled to perform petty acts, and to enter upon trifling contracts without deed, must have a head by whom such acts would be in fact performed, the powers of the whole body being considered as vested in him for such purposes; but that where there was no head, such acts, although of minor importance and continual occurrence, must be done, if at all, under deed. . . . There is nothing, it is conceived, in any modern case, to lead to

the conclusion that this distinction no longer exists, and the terms in which it is noticed in the judgments of the courts in several late cases on this subject, seem to show that it still forms part of the law. Perhaps, therefore, the most safe mode of entering upon such contracts and acts as are above referred to, not being essential to the objects of the corporation, is by deed under seal, in cases where the corporation is without a head, or person specially designated by the constitution of the body for such purposes." There is one class of corporate acts which may be performed so as to bind the corporation without seal, namely: such as are entered of record, the corporation being estopped by the record to say that it is not its deed. See *Viner's Abridgment*, tit. Corporations, K.

porations valid, though not under seal; and it is now said to be well settled that "when the constitution and end of a corporation require that certain contracts should be made, and work done, and such contracts have been entered into by agents lawfully authorized, and work performed and materials supplied in pursuance of the same, the corporation will be liable to an action, if not upon the special contract, at least on the common counts."¹ The rule that employés may be engaged in behalf of corporations by parol, does not extend to cases where there is no special urgency for, or utility in, the engagement; such, for instance, as a clerk to the master of a workhouse, who, it has been held, cannot maintain an action for dismissal, unless employed by a formal contract under seal.² It is said that "a trading corporation may make binding contracts in furtherance of the purposes of its incorporation without using its seal, provided such contracts do not relate to matters of a special and unusual nature."³ In the case last cited, CAMPBELL,

¹ Green's Brice's *Ultra Vires*, 2d Am. Ed. 450, referring to *Clarke v. Cuckfield Union*, 21 L. J. Q. B. 349; *Sanders v. Guardians of St. Neot's Union*, 8 Q. B. 810; *De Grave v. Mayor, etc., of Monmouth*, 4 C. & P. 111; *Beverley v. Lincoln Gaslight, etc., Co.*, 6 Ad. & E. 829; *Church v. Imperial, etc., Co.*, Ibid. 846; *Nicholson v. Bradford Union*, L. R. 1, Q. B. 620; *Wells v. Mayor, etc., of Hull*, 10 C. P. 402; 44 L. J. C. P. 289. The soundness of the following legal proposition of WIGHTMAN, J., in *Clarke v. Cuckfield Union*, *supra*, will scarcely be questioned: "I am disposed to think that wherever the purposes for which a corporation is created render it necessary that the work should be done, or goods supplied, to carry such purposes into effect, as in case of the guardians of a poor law union, and orders are given at a board regularly constituted, and having gen-

eral authority to make contracts for works or goods necessary for the purposes for which the corporation was created, and the work done or goods supplied and accepted by the corporation, and the whole consideration for payment executed, the corporation cannot keep the goods or the benefit, and refuse to pay, on the ground that though the members of the corporation who ordered the goods or the work were competent to make a contract and bind the rest, the formality of a deed, or of affixing the seal was wanting, and then say: No action lies; we are not competent to make a parol contract, and we avail ourselves of our disability."

² *Dyte v. St. Pancreas Board of Guardians*, L. R. C. P. 91; *Austin v. Guardians of Bethnal Green*, 27 L. J. N. S. 342.

³ Green's Brice's *Ultra Vires*, 2d Am.

C. J., said: "If the contract had been shown to be in any way incidental or auxiliary to carrying on the business of copper miners, the contract would have been binding, though not under seal; for where a trading company is created by charter, while acting within the scope of its charter, it may enter into the commercial contracts usual in such a business in the usual manner."¹ In another case, where the decision of the court was unanimous, BOVILL, C. J., remarked that "a company can only carry on business by agents, managers, and others, and if the contracts made by these persons are contracts which relate to objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding upon the company, though not under seal. It has been urged that the exceptions to the general rule are still limited to matters of frequent occurrence and small importance. The authorities do not sustain that argument."² Subsequently it was held that a company was bound by a contract not under seal for the purchase of goods, notwithstanding the goods were not intended for the use of the company, and this fact was known to the person with whom the contract was made.³

Some confusion and conflict is noticeable in the English decisions as to what acts are of ordinary occurrence, the exception to the rule requiring a seal not extending to un-

Ed. 453, referring to *Broughton v. Manchester Water Works Co.*, 3 B. & Ald. 1; *Copper Miners' Co. v. Fox*, 16 Q. B. 229.

¹ See *Henderson v. Australian Royal Mail Steam Nav. Co.*, 5 E. & B. 409; 24 L. J. Q. B. 322, in which POLLOCK, C. B., said: "It is now perfectly established by a series of authorities, that a corporation may, with respect to those matters for which it is expressly created, deal without a seal."

² *South of Ireland Colliery Co. v. Waddle*, L. R. 3, C. P. 463; *aff'd on ap-*

peal, 4 Id. 617. In *Reuter v. Electric Telegraph Co.*, 6 E. & B. 341, CAMPBELL, J., said: "No reliance can be placed upon the objection that the defendants are a corporation and that the agreement on which they are sued is not under seal. They are a corporation for carrying on a particular business, and the services done by the plaintiff were in the direct course of the business which by their charter they were to carry on."

³ *Matter of Contract Corporation*, etc., L. R. 8, Eq. 14.

usual or uncommon acts. Thus, "in one case, a railroad company was held not liable to an action on a contract not under seal for work done by a party in substituting a new line of railway for the old one; and in another case a dock company could not sue on a similar contract for cleansing and removing the filth and dirt accumulating in its docks and basins; though under almost precisely similar circumstances a municipal corporation was held liable for dredging a harbor, notwithstanding the work was done under a parol agreement."¹ Of course, when the charter expressly

¹ Green's Brice's Ultra Vires, 2 Am. Ed. 455, referring to Diggle v. London & Blackwell R.R. Co., 5 Exch. 442; 19 L. J. Exch. 308; Whitehead v. Buffalo, etc., R.R. Co., 7 Grant (Up. Can. Ch. 1857), 357; London Dock Co. v. Sinnott, 8 E. & B. 347; 27 L. J. 129; Brown v. Corp. of Belleville, 30 N. C. Q. B. 373: "The doctrine that a corporation can act only by its common seal, and can enter into and be bound by no contract without that solemnity, claims to stand on grounds both ancient and venerable; cases in the Year Books of the 4th Edward, and 6th, 7th, and 8th Henrys. But an examination of the subject in those cases will afford no great reason to admire the accordance and unanimity of the judges, the solidity of their reasons, or the sagacity of some of the distinctions they were led to recognize or establish. In general it is said a corporation cannot do any act of importance without a deed, but they may employ one in ordinary services, as a butler, cook, or the like, or to make a distress on their behalf. They may speak in whispers, it seems, but not more audibly. An act *in pais* it is said they may not do without their common seal, yet they may do an act upon record, for they are estopped by the record to say it is not their act. They are allowed in such case then to

speak and be heard in some other mode than by the common seal. Even the seal itself, by which alone it is sometimes said they are to speak and act, affords very equivocal evidence of common assent." Baptist Church v. Mulford, 3 Halst. 182, per EWING, C. J. The Companies' Clauses Act, 8 & 9 Vict., ch. 16, secs. 95, 97, after providing that the directors may appoint committees, enacts that "with respect to any contract which if made between private persons would by law be valid, although made by parol only and not reduced to writing, such committee or the directors may make such contract on behalf of the company by parol only without writing, and in the same manner may vary or discharge the same." The Joint Stock Companies' Act of 1856 as amended in 1867, 30 & 31 Vict., ch. 131, sec. 37, provides that contracts may be made by parol "on behalf of the company by any person acting under the express or implied authority of the company." The Metropolitan Gas Act of 1860, 23 & 24 Vict., ch. 125, sec. 20, enacts that "every contract of the gas company entered into in accordance with this act, shall, without seal, be binding on them if the contract be signed by at least two of their directors, or by the secretary or other officer by the au-

provides that contracts of the corporation shall be under the corporate seal, that form must be observed, and authority to dispense with the use of the seal cannot be presumed.¹

§ 91. **Agent need not be appointed by deed.**—The common law rule with regard to natural persons that an agent to bind his principal by deed must himself be empowered by deed, cannot in the nature of things be applied to corporations aggregate. The latter are, literally speaking, incapable of a personal act. That an aggregate corporation acts and speaks by its common seal, is only figuratively true. There must be acting and speaking before the use of the seal and the real assent necessarily precede it. "The corporation is indeed an artificial, ideal, invisible person, and as such can neither think nor act; but it is composed of divers actual members whose united voices form the voice of the corporation, and who alone in fact and truth think and act. The seal then is not the act of the corporation, but the evidence of the act; is not the voice of the corporation, but the evidence that it has spoken."²

In a case which came before all of the judges at Sergeant's Inn in the year 1717, it was decided, after an elaborate argument, that a bank note was duly signed by an agent authorized by vote, or at least without the corporate seal.³

thority of at least two of their directors." See Green's Brice's *Ultra Vires*, 2d Am. Ed. 464, 465. In *Marshall v. Queensborough*, 1 Sim. & Stu. 520, the vice-chancellor stated that if a regular corporate resolution passed for granting an interest in a part of the corporate property, and upon the faith of that resolution expenditure was incurred, he was inclined to think that both principle and authority would be found for compelling the corporation to make a legal grant in pursuance of that resolution. See *Gt. Northern*

R.R. Co. v. Manchester, etc., R.R. Co., 10 Eng. L. & Eq. 11; 16 Jur. 146.

¹ *Frend v. Dennett*, 27 L. J. C. P. 314; *Crampton v. Varna R.R. Co.*, L. R. 7, Ch. 562. See *Indianapolis, etc., R.R. Co. v. Morganstern*, 103 Ill. 149.

² *Baptist Church v. Mulford*, *supra*.

³ *Rex v. Bigg*, 3 P. Wms. 419. In *Manby v. Long*, 3 Levinz, 107, it was held that the agent of a corporation might make a distress, although his appointment had not been authenticated by the common seal.

Long afterward it was held by the Supreme Court of the United States that the indorsement of a promissory note by the cashier of a bank authorized by vote was obligatory on the corporation. In delivering the opinion it was said that the ancient doctrine in relation to a common seal had no application to corporations created by statute, whose charters contemplate the business of the corporation to be transacted exclusively by a special board of directors, and that the acts of such a body or board, evidenced by written vote, were as completely binding on the corporation as the most solemn acts done under the corporate seal.¹ Similar decisions have been repeatedly rendered by the courts of this country.²

If the corporation, or its representative the board of directors, can assent to an act primarily by vote alone, to insist that it can constitute an agent to make a deed only by deed, is to say that it can constitute no such agent whatever, for some person must be empowered by vote to seal the power of attorney.³ There is, therefore, no good reason why it should be necessary to appoint an agent by an instrument under seal, whatever may be the object of the agency, but his act may be made valid by the subsequent

¹ *Fleckner v. Bank of U. S.*, 8 Wheat. 338. See *Mechanics' Bank of Alexandria v. Bank of Columbia*, 5 Id. 326; *Bank of Columbia v. Patterson*, 7 Cranch, 299.

² See *Osborn v. Bank of U. S.*, 9 Wheat. 738; *Bank of U. S. v. Dandridge*, 12 Id. 70; *Lathrop v. Commercial Bank*, 8 Dana, 114; *Bates v. Bank of Ala.*, 2 Ala. 461; *Savings Bank v. Davis*, 8 Conn. 191; *Stamford Bank v. Benedict*, 15 Id. 445; *Western Bank v. Gilstrap*, 45 Mo. 419; *Narragansett Bank v. Atlantic Silk Co.*, 3 Metc. 282; *Howe v. Keeler*, 27 Conn. 538; *Santa Clara Assoc. v. Meredith*, 49 Md. 389; *Crowley v. Genesee Mining Co.*, 55

Cal. 273. In *Mickey v. Stratton*, 5 Sawyer, 475, DEADY, J., said: "I find the seal upon this deed is that of the corporation of that date. This being so, and the signatures of the proper officers appearing signed thereto, the presumption is that these officers did not exceed their authority in this respect; and the seal itself is *prima facie* evidence of their authority." See, to the same effect, *Wood v. Whelen*, 93 Ill. 153; *Indianapolis, etc., R.R. Co. v. Morganstern*, 103 Id. 149.

³ *Hopkins v. Gallatin Turnp. Co.*, 4 Humph. Tenn. 403. See *Beckwith v. Windsor Manuf. Co.*, 14 Conn. 594; *Burr v. McDonald*, 3 Gratt. 215.

ratification of the corporation.¹ In England an objection to a bill filed by a railroad company for the specific performance of a contract for the purchase of land entered into by its agent, that it did not appear that the agent was authorized under the corporate seal, was overruled on the ground that the company previous to the filing of the bill

¹ *Howe v. Keeler*, 27 Conn. 538; *New Athens v. Thomas*, 82 Ill. 259. In *Savings Bank v. Davis*, 8 Conn. 191, *BISSELL, J.*, in dissenting from the holding of the court that an agent might be clothed with authority to mortgage the real estate of a bank by a vote of the board of directors without a power of attorney under the corporate seal, presented among other the following considerations: "When an individual conveys by attorney the statute requires that the power to convey shall be executed with the same formalities as the deed itself, and that both the power and the deed shall be recorded. Now I would inquire upon what principle it is that corporations are to be exempted from these plain and explicit provisions of the statute? Why should they not be bound by those legal requirements which are imperative upon individuals and are indeed of universal application? And why, when the law requires of an individual that he should act by deed, are corporations permitted to act by vote? Is there anything of peculiar solemnity in the vote of a corporation? And, in this case, is it anything more than a mere parol authority to execute the mortgage? Is there the remotest analogy between such a vote and a deed duly executed, acknowledged, and recorded? To me it does seem that the doctrine contended for is not only repugnant to the well-settled principles of the common law, but that it is also opposed to the whole frame and spirit of our statute regulations regarding conveyances. And especially

is it opposed to the policy of our recording system. That system demands that the evidence, and the entire evidence respecting the conveyance of real estate, should appear upon the public records. These records are always open to public inspection, and are presumptive notice to the whole world of the facts which there appear. A purchaser ought to be enabled there to trace the entire written evidence of his title. If the conveyance be by attorney, the power to convey must be recorded with the deed. The power is indeed a constituent and essential part of the conveyance. . . . It is, however, urged that there exists no reason at common law why the appointment of an agent to convey lands should not stand on the same ground and be evidenced in the same manner as the appointment of an agent for any other purpose; for that previous to the 29 Car. 2, lands were conveyed by parol; that at common law writing and sealing were wholly unnecessary. It ought to be remembered that when lands were thus conveyed, livery of seizin was an indispensable requisite, and that when lands thus passed from man to man, a corporation could not so grant or take. The reason was that the giving and taking of livery were personal acts, and when any personal act is to be done by a corporation, the act must be done by attorney. The appointment of an attorney to take or make livery of seizin or the like without deed was void."

had not only acted on the contract by taking possession of the property, but had constructed the railroad on it.¹ It was stated by the Supreme Court of New Hampshire a long time ago that the weight of authority in this country seemed to be in favor of the position that private corporations or boards of directors through which their business was transacted might appoint an agent for the conveyance of real estate by vote, without a power of attorney or instrument under the corporate seal. "If," said the court, "the formality of an instrument under seal conferring the power upon the agent who is to make the conveyance should be required, it would add nothing to the authenticity of the conveyance if the individual who affixes the seal to the power derives his authority from a mere vote of the corporation."²

§ 92. Rule as to corporate seal in the United States.—The old rule that, as a general proposition, a corporation cannot expressly bind itself except by deed unless the charter authorizes it to contract in another mode, has been entirely overturned in this country, and it is now well settled that the acts of corporations may be proved in the same manner as the acts of individuals. If the law requires that the contract of a private person shall be in writing under seal, a corporation under the same circumstances must contract in the same way; if the contract of a private person must be in writing, signed by the party to be charged therewith, the contract in the case of a corporation must also be in writing, and be signed by an officer or agent duly authorized; and a parol contract, which would be binding upon a private person when entered into by an agent of a corporation acting within the scope of his authority, will bind the corporation.³ Acts of a corporation evidenced by a

¹ London & Birmingham R.R. Co. v. Winter, 1 Craig & Ph. Ch. 57.

² Dispatch Line of Packets v. Bellamy Manuf. Co., 12 N. H. 205.

³ Trustees of University v. Moody, 62 Ala. 389; Merrick v. Burlington, etc., Plank R. Co., 11 Iowa, 74; Christian Church v. Johnson, 53 Ind. 273;

vote are as binding upon it and as much authority to its agents as the most solemn acts done under the corporate seal. If there be no record evidence of such acts, they may be proved by the testimony of witnesses; and even where no direct evidence can be given, facts and circumstances may be shown from which the acts may be inferred.¹ But

Sheffield Township v. Address, 56 Id. 157; Gowen Marble Co. v. Farrant, 73 Ill. 608; New Athens v. Thomas, 82 Id. 259; New England Ins. Co. v. Robinson, 25 Ind. 536; Kelly v. Board of Public Works, 75 Va. 263; Whitford v. Laidler, 94 N. Y. 145.

¹ St. Mary's Church v. Cagger, 6 Barb. 576; Davenport v. Peoria, etc., Fire Ins. Co., 17 Iowa, 276; Sheffield School Township v. Address, 56 Ind. 157; Buckley v. Briggs, 30 Mo. 452; Union Bank of Md. v. Ridgley, 1 Harr. & Gill, 324; Curry v. Bank of Mobile, 8 Porter, 360; Chesapeake & Ohio Canal Co. v. Knapp, 9 Peters, 541; Fleckner v. U. S. Bank, 8 Wheat. 358; Bank of Metropolis v. Gutschlick, 14 Peters, 19. See Thorndike v. Barrett, 3 Me. 380. There is a vast amount of business, some of it of the highest importance, which is transacted by officers of corporations without any authority under seal, and oftentimes without any writing. "Nor are these acts such as come within the authority of the office of the agent. As an illustration, I may speak of the satisfaction of judgments by cashiers of banks, who usually have no authority in writing for that purpose, and act simply from usage, and, in fact, convenience. This is a very important act, the discharging of a debt of record by indorsement of the cashier, and yet no court would allow his right to do so to be questioned upon any ground of want of authority under seal or in writing. Proof of usage by the bank, or adoption of the officer's act, would be held sufficient, without show-

ing any authority for the power exercised. A much stronger case is that of a transfer of a judgment to a co-debtor or co-surety who had paid the debt; and here, this court, should such a case arise before it, would not allow the bank to disclaim the act on the ground that the officer had no written or verbal authority. Usage in the conduct of the business of the bank in such cases would be sufficient authority, and no impeachment of it would be allowed except upon the ground of fraud." COMEGYS, C. J., in *Bancroft v. Wilmington Conference Academy*, 5 Houst. Del. 577. A person agreed with J., president of an incorporated rifle club, that he would furnish materials and do certain work on the buildings of the club for an agreed sum. The club had no corporate seal, but the parties executed the contract by subscribing their names, affixing their respective seals to it in the form of scrolls made with a pen, J. adding to his signature the words "President of the Wilmington Rifle Club." The action was not against the club, but against J. personally. The court said: "It was competent for the defendant, had he seen proper to do so, to have charged himself in the contract for the work to be performed by the plaintiff so as to have made himself liable for it; but, to warrant that construction of it, such should clearly be the purport of the instrument upon its face. It was, however, neither his individual covenant, nor the covenant of the club and the incorporated company of which he was

when a statute provides that the corporation shall keep a record of all of its doings, which shall be open to the inspection of all persons interested therein, the consent of the corporation to a conveyance must be shown by the record, or at least by a vote, the members having regularly assembled for that purpose.¹

It was remarked by Judge STORY, in a case in the Supreme Court of the United States, that "The technical doctrine that a corporation could not contract except under its seal, or, in other words, could not make a promise, if it ever had been fully settled, must have been productive of great mischief. Indeed, as soon as the doctrine was established that its regularly appointed agent could contract in its name without seal, it was impossible to support it, for otherwise the party who trusted such contract would be without remedy against the corporation. Accordingly it would seem to be a sound rule of law that whenever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation; and all duties imposed on them by law, and benefits conferred at their request, raise implied promises, for the enforcement of which an action may well lie. . . . The opposite doctrine, if it were yielded to, is so purely technical that it would answer no salutary purpose, and would almost universally contravene the public convenience."² In a recent case in New

the president; first, because he executed it on behalf of the company, and as the agent and president of it, and not in his own name or on his own part individually; and secondly, because it is not sealed with the seal of the company, and for the best of reasons, as it appears from the evidence that it has never had one. Nevertheless, if the contract was so made and executed by him with the sanction and consent of the company, the plaintiff

would not be without his remedy in another form of action against it to recover for labor and materials under the contract." *McCaulley v. Jenney*, 5 *Houst. Del.* 32.

¹ *Isham v. Bennington Iron Co.*, 19 *Vt.* 230.

² *Bank of Columbia v. Patterson*, 7 *Cranch*, 299. The seal of a corporation is not necessary to give validity to an agreement for the sale of real property—*The Banks of Poiteaux*, 3 *Rand*, 136,

Jersey,¹ in which it was objected to the validity of a lease to a corporation that it was not executed by the corporation under its corporate seal, the court said: "This contention was founded upon the ancient rule of the common law that a corporation could neither act, speak, nor whisper apart from the instrumentality of its common seal. But the rule, opposed as it was to the demands of practical business necessity, suffered at an early day in England important modifications; and in this country, since the decision in *Bank of Columbia v. Patterson*,² the doctrine has received but slight recognition, and now it may be considered as practically abrogated. In this State, in the case of

—and the contract will be enforced in equity. *Legrand v. Hampden Sidney College*, 5 Munf. 324; *Stoddert v. Vestry of Port Tobacco Parish*, 2 Gill & Johns. 227; *Mayor of Stafford v. Till*, 4 Bing. 75; *London Co. v. Winter*, 1 Craig & Ph. 63. See *Wilmot v. Coventry*, 1 Younge, etc., Exch. 518. A contract in writing not under seal between the committee of a corporation and an individual, that the latter might occupy the hotel of the corporation for one year, with the right of renewal for two additional years if he kept the hotel in a manner satisfactory to the committee, was held valid. *Stanley v. Brunswick Tontine Hotel Corp.*, 13 Me. 51. It was said by the court in an early case in South Carolina: "The general rule is, that a corporation aggregate cannot do any act of importance without a deed, that is, some instrument under seal, though there are many exceptions to the rule. The first exceptions were founded on convenience in small matters, and gradually this relaxation widened, to embrace more important matters. At length it seems to have been established that though a corporation cannot contract directly, except under seal, yet it may by vote,

or other act sufficiently expressive of the corporate will and intention, appoint an agent whose acts and contracts, within the scope of his authority, will be binding on the corporation." *Garvey v. Colcock*, 1 Nott & McCord, 231. "A corporation aggregate which acts through the intervention of a board of directors or managers, and keeps a register of its acts, may be bound by its record without the annexation of a common seal. Its acts are authenticated by its own corporate registry, which it should be estopped to deny or impeach when genuine and authoritative. In this particular the American corporations are unlike most, if not all, of the common law corporations; the former being represented generally by a board of directors who keep a record of their proceedings, and the latter seldom or never thus acting; and hence, however rigidly the ancient practice may have required a seal to all the acts of common law corporations, the same reason does not with equal force apply to modern corporations." *Garrison v. Combs*, 7 J. J. Marsh, 84, per ROBERTSON, Ch. J.

¹ *Crawford v. Longstreet*, 43 N.J. 325.

² 7 Cranch, 299.

Baptist Church v. Mulford,¹ the subject received full consideration in the Supreme Court, and the authorities bearing on the subject were quite fully collated. Since the decision in that case the question has, in this State, been considered as at rest."

§ 93. **Ancient method of sealing.**—A seal, as commonly understood, has a twofold signification—an instrument composed of metal, stone, or other hard substance employed to make impressions on legal instruments, and also the substance or thing impressed. The Greek and Roman seal was ordinarily set in a ring. "Merlin defines a seal to be a plate of metal with a flat surface on which are engraved the arms of a prince or private individual or other device, with which an impression is made on wax or other soft substance, or on parchment or paper, in order to authenticate them."² The bulls of the popes were sealed with lead or gold, the word *bullæ* meaning an impression in metal.³ "The wax most anciently employed was white. When about the ninth or tenth century wax was made of various colors, only emperors and kings might seal in red. In the twelfth century it was customary in France to seal letters addressed to persons of high eminence with green wax. This color was introduced into Germany in the fourteenth century, and was appropriated by religious houses and cities. Blue seals were very rare, and Charles the Fifth of Germany is said to have been the only European monarch who used this color. The patriarchs of Jerusalem and Constantinople and the grand masters of the order of Malta and of the Teutonic order in Germany sealed in black. Private persons usually used yellow wax, and this color is frequent in public documents of about the twelfth century. . . . The most ancient mode of sealing was probably that of applying the wax directly to the parchment. When the instrument was written upon two or

¹ 3 Halst. 182.

² 1 Bouv. Inst. 344.

³ Jac. L. Dict.

more leaves, the wax was made to reach them all by impressing it upon an incision made in the parchment in the form of a cross. The seal was sometimes also made upon the ends of thongs or strips of parchment run through the several sheets. Lead, silver, or gold *bullæ* were almost of necessity appended by a cord or strip. In the twelfth century it seems that, in France at least, pendent seals had displaced the other sort. They are still used generally for letters patent, treaties, and other important public documents."¹

§ 94. Sealing at common law and by statute.—By the common law the impression in sealing must be made upon wax, wafer, or some other tenacious substance. Formerly, wax being the most convenient, was the only material used to receive and retain the impression of a seal. Hence it was said by Sir Edward Coke, "*Sigillum est cera impressa, quia cera? Sine impressione, non est sigillum.*" But from this it did not follow that an impression without wax was not a seal. It was accordingly held that an impression made upon any adhesive substance capable of receiving an impression came within the definition of *cera impressa*. Seals were very commonly impressions made upon pieces of paper annexed by a wafer, gum, or paste to the instrument sealed; or two such pieces of paper were secured to each other and to tapes passed through the paper or parchment of the instrument by wafer or other adhesive substance and the impression made upon one of these pieces of paper.²

¹ New Am. Cycl., tit. Seal.

² See *Bank of Rochester v. Gray*, 2 Hill, 228; *Farmers' Bank v. Haight*, 3 Id. 492. In *Sugden on Powers*, 1st Am. Ed. 236, the rule is thus laid down: "It is not necessary that an impression should be made with wax or with wafer. If the seal, stick, or instrument used be impressed by the

party on the plain parchment or paper with an intent to seal it, it is clearly sufficient." The foregoing was referred to with approval by the court in *Regina v. Inhabs. of St. Paul's, etc.*, 7 Adol. & Ell. N. S. 232, Lord DENMAN observing: "We do not wish to encourage the slightest doubt on this point." See *Mathews on Presump.* Ev. 36.

Although the practice of sealing written instruments had its origin in an illiterate age, when the art of writing was not generally understood, and on that account was probably necessary as a mode of authentication, yet it seems to us that apart from any such consideration, it had and continues to have a substantial utility, and that the light and almost contemptuous terms in which it is now sometimes characterized are undeserved. The significance of a seal in law at present is that it imports a deliberate, carefully considered, and well-understood act on the part of the person who affixes his signature. The fact that a different and more formal method of executing written instruments is required when important interests are involved than in ordinary transactions, is calculated to attract the attention of the parties and make them cautious. Thus, sealing becomes a safeguard against imposition, especially to the inexperienced and over-confiding. It was said by a judge in a modern case: "It was the fact that the obligor did two independent acts—first that of signing, and secondly that of sealing; that in the theory of the common law gave so much more solemnity to the contract and imported so much greater deliberation, and therefore entitled it to be enforced without any proof of a particular consideration or recital that it was for value received, as well as extended its vitality beyond the period of six years, and excepted it from the bar incident to all personal contracts which are merely signed by the promissor."¹ In *Warren v. Lynch*² a question arose with reference to a writing in the

¹ DEWEY, J., in *Bates v. Boston & N. Y. Cent. R.R. Co.*, 10 Allen, 251. See *Guthrie v. Imbrie*, 12 Oregon, 182. In the absence of any statute or usage, a scroll, whether made by a pen or type, does not change the character of the instrument from a simple contract to one under seal, or give it the legal effect of importing a consideration

when none is expressed, or extending the statute of limitations from the period of six to twenty years. Such contract is entitled to all the binding effect upon the promissor, that a contract not under seal has, and no more. *Bates v. Boston & N. Y. Cent. R.R. Co.*, *supra*.

² 5 Johns. 238.

form of a note concluding with the words, "Witness my hand and seal," signed by the maker with the letters L. S. inclosed in an ink scroll at the end of the name. Chief-Justice KENT, who delivered the opinion of the court, said that a scrawl with a pen was not a seal; that the policy of the rule consisted in giving ceremony and solemnity to the execution of important instruments by means of which the attention of parties is more certainly and effectually fixed, and fraud less likely to be practiced upon the unwary. In a case in Massachusetts, it was said by the court: "If we should pronounce a scroll a seal, we would speedily be called upon to take the next step of pronouncing every flourish to be a scroll; and nothing would remain of the ancient formality of sealing. Such a course would not only be an unwarrantable judicial innovation upon the common law, but would obliterate the important practical distinction between two classes of instruments of different degrees of solemnity, one of which does, and the other does not, conclusively import a consideration; one of which remains binding for twenty years, while the other is by statute subject to a limitation of six years. No case has been found where such a printed device has been regarded as a seal by any court which preserves the distinction between seals and scrawls, or scrolls."¹ The rule in relation to sealing instruments has, however, been relaxed in many of the States, and a scroll rendered by statute or judicial decision sufficient.² Without enumerating all of the States in which this innovation upon the former practice is allowed, it may be sufficient to mention Connecticut, Illinois, Ohio, Oregon, Virginia, and Wisconsin.³ In Michigan, excepting where an official or corporate seal is required, any device

¹ *Hendee v. Pinkerton*, 14 Allen, 381, 1874, p. 270, sec. 1; Rev. Sts. of Ohio, per FOSTER, J. Ed. of 1880, sec. 4; Genl. Laws of Or-

² See *Johnston v. Crawley*, 25 Ga. 316. egon, Ed. of 1872, p. 238; Code of Va.,

³ Genl. Sts. of Conn., Ed. of 1875, p. Ed. of 1873, p. 985; Rev. Sts. of Wis., 438, sec. 17; Rev. Sts. of Ill., Ed. of Ed. of 1878, p. 636, sec. 2215.

affixed to a written instrument by way of a seal by the person signing the same is sufficient.¹ In a case in Maine, the question was whether certain instruments purporting to be railroad bonds were in fact bonds, or only simple contracts. They bore on their face the imprint in red ink of what purported to be a corporate seal, bearing the title of the corporation, and the year of its charter, pursuant to a vote of the directors under a statute authorizing corporations, among other things, to have a common seal to be altered by them at pleasure. That the imprint was recognized as the common seal of the corporation, was inferable from the words, "In testimony of which, pursuant to authority vested in us for this purpose by the directors of said company, the seal of said company, and the signature of the president and treasurer thereof, are hereto affixed." The court said: "Here, then, is a substance affixed to the instruments more tenacious than wax or wafer, adopted and declared by the company to be their seal, and we know of no decision in this enlightened age which declares it to be otherwise."²

It has been frequently held that the impression of a distinctive seal, without wax or other substance, on an instrument calling for the seal of a corporation, is a valid seal.³

¹ Comp. L. of Mich., vol. 2, p. 1708. In Tennessee and Texas, no private seal or scroll is necessary to the validity of any contract, bond, or conveyance, "except such as are made by corporations." Sts. of Tenn., Ed. of 1871, sec. 1804; Rev. Sts. of Texas, Ed. of 1879, p. 644, art. 4487. In Alabama, "all writings which import on their face to be under seal, are to be taken as sealed instruments, and have the same effect as if the seal of the parties was affixed thereto." Code of Ala., Ed. of 1876, p. 573, sec. 2194. In Indiana it is provided by statute that "there shall be no difference in evidence between sealed and unsealed

writings; and every writing not sealed shall have the same force and effect that it would have if sealed." Sts. of Ind., Eds. of 1862 and 1870, vol. 2, p. 180, sec. 273. Whether a mere scrawl would be regarded in New Hampshire as a sufficient seal to authenticate a protest by a notary public without evidence of the official character of the notary, *quere*. Carter v. Burley, 9 N. H. 558.

² Woodman v. York & Cumberland R.R. Co., 50 Me. 549.

³ See Beardsley v. Knight, 4 Vt. 479; Bank v. Slason, 13 Id. 334; Follett v. Rose, 3 McLean, 382; Pillow v. Roberts, 13 How. 472, per GRIER, J.;

In an early case in New York, LIVINGSTON, J., in delivering the opinion of the New York Supreme Court, said: "However ancient the use of seals as a mark of authenticity to instruments may be, or to whatever cause their origin may be ascribed, it is certain that in modern times a private seal is not regarded as evidence of truth, or of belonging to the party to whose signature it is affixed, but that men promiscuously use each other's seals without attention to the impression, or coat of arms. Thus, it is no uncommon thing to see a seal containing the device, arms, and perhaps name, of one person used to authenticate the instrument of another. If it be not necessary, then, that in sealing a deed the grantor should affix his own, but may adopt the seal of a stranger, why should it be exacted that the materials on which the impression is made should be of wax, wafer, or any other particular composition? Why should not any impression or mark answer as well as the common mode of sealing, provided it be durable, whether it be stamped on the paper itself, or on something laid upon it, if it be made as a solemn act of confirmation, and deliberately acknowledged as the seal of the party making it?" In the foregoing case, the principal question was, whether an instrument purporting to be a bond, should be regarded as a specialty where the letters L. S. were affixed to the obligor's name without wax or wafer. The decision was, however, rendered on another point. As the instrument was made in Pennsylvania, where a scroll was recognized as a seal, the court treated it as such, adopting the law of the place of the contract. Williams on Real Property, 8th ed., p. 144, says: "In modern practice, the kind of seal made use of is not regarded; and the mere placing of the finger on a seal already made, is held to be equivalent to sealing; and the words, 'I deliver this as my act and

Moore v. Jones, 2 Ld. Raym. 1536; v. Graham, 3 Cranch, 229; Chilton v. Holman v. Borough, 2 Salk. 658; Cook The People, 66 Ill. 501.

deed,' which are spoken at the same time, are held to be equivalent to delivery, even if the party keeps the deed himself."¹ The following language was used some time ago by the Supreme Court of New Hampshire: "Most seals have in this State not been affixed in wax or wafer, or to any adhesive substance, but they have been impressed upon paper attached by a wafer or paste, by the effect of which the paper was rendered susceptible of receiving and retaining the impression of the seal. When, then, presses have been contrived of such power as to make an equally distinct and permanent impression directly upon the paper alone, it does not seem consistent to hold that the wafer or paste, whose chief use was to facilitate the making of the impression upon the paper under which it was put, is still requisite when it has ceased to be either necessary or useful for that purpose. Heretofore, and now, the impression of the seal has been made upon the paper, which seems, therefore, at this day precisely that tenacious substance which is capable of receiving the impression required for a seal."² It was said by the court in a case in Massachusetts:

¹ Meredith v. Hinsdale, 2 Caines, 362.

² Allen v. Sullivan R.R. Co., 32 N. H. 446. In Corrigan v. Trenton Del. Falls Co., 1 Halst. Ch. 52, the Chancellor said: "According to Lord Coke, a seal is wax with an impression, because wax without an impression is not a seal. It is clear that by this definition the impression makes the seal. It is true that if this definition is strictly taken, there must not only be an impression, but that impression must be on wax. But the impression is the *sine qua non* of Lord Coke's seal; the wax is only auxiliary; it adheres to the paper and receives the impression, and is the material which annexes the impression to the instrument. But we have long since grown out of the substance or essence of Lord Coke's definition, the impression. The question

is, are we yet fast in the wax? We have said by long practice, that both of these were not necessary. With which of them would Lord Coke have been the better satisfied? Clearly, with the impression; nay, he would not have dispensed with that at all. What proportion of seals used on private papers nowadays would fall within his definition? A wafer placed at the end of the name, with a piece of paper on it, or without the piece of paper, and without any impression, is a seal; and by the same rule of reasoning, or absence of reasoning, a drop of sealing wax dropped in a proper position in relation to the name, and without an impression or bit of paper upon it, would be a seal, provided the writing called for a seal. Lord Coke's definition has been entirely departed from, and the mere wax or

"After our own courts have allowed wafers instead of wax, and paper with gum or mucilage instead of wafers, there seems little reason why we should hesitate also to allow the sufficiency of an impression of a corporate seal on the paper itself. The extent to which the practice has prevailed among corporations; the fact that the seals of all our own courts have been from an early period of the same description; the sanction of numerous decisions in other States, and in the federal courts; the convenience and unobjectionable character of the usage, are arguments in its favor too powerful to be resisted, in the absence of any decisive authority to the contrary."¹ It is now provided by statute in Massachusetts, that when the seal of a corporation "is required by law to be affixed to any paper, the word seal shall include an impression of the official seal made upon paper alone, as well as an impression made by means of a wafer or wax affixed thereto."² Similar statutes have been adopted in Connecticut, Rhode Island, and Vermont.³ The mere printing of a fac-simile of the seal of a corporation at the same time and by the same agency as the printing of the instrument, to be afterward signed by the president and treasurer, leaving nothing to be done by the officers of the corporation, who alone are authorized to affix the corporate

wafer put on to receive the seal is recognized as the seal. How can it be said that the impression, the essence of the definition, appearing on the paper is no seal because it is impressed without wax?"

¹ *Hendee v. Pinkerton*, 14 Allen, 381.

² Public Sts. of Mass. of 1882, p. 59.

³ Genl. Sts. of Conn., Ed. of 1875, p. 438, sec. 17; Public Sts. of R. I., Ed. of 1882, p. 78, sec. 14; Rev. Laws of Vt., Ed. of 1880, p. 76, sec. 17. In Ohio, the word seal includes any character or mark intended for a seal, and in all cases when a seal is required by law, and the kind is not specified, "a

seal of either wax or wafer, or other adhesive substance, or an impression upon such substance, or upon the paper or material upon which such instrument is written, or a scroll seal, will be sufficient." Rev. Sts. of Ohio, Ed. of 1880, sec. 4. In Oregon, a private seal may be made by a stamp or impression upon wax, wafer, paper, or any other like substance, or "without an impression, by a wafer or wax attached to the instrument, or by a paper attached to it by an adhesive substance, or by a scroll or other sign made with a pen." Genl. Laws of Oregon, Ed. of 1872, p. 258.

seal, is in derogation of the common law theory of sealing contracts.¹ But if the blank is stamped or printed by the printer by direction of the proper officers of the corporation, and they adopt his act, and subsequently sign and issue the instrument, it becomes obligatory on the corporation. This is substantially what is done when a scrivener prepares and affixes a seal to a deed which the grantor thereupon signs and delivers.²

In England, the making of an impression, upon which Sir Edward Coke in his definition of a seal lays so much stress, is no longer considered essential. A deed was sent from England to Melbourne under a commission to be executed and acknowledged by certain persons. When sent, the deed had pieces of green ribbon attached to the places where the seals should be, but no wax or other material to receive an impression; and it was returned in the same condition, but in all other respects duly executed. The attestation clause recited that the deed was "signed, sealed, and delivered," and two of the commissioners certified that the persons signing it "acknowledged the same to be their respective acts and deeds." It was held that there was sufficient *prima facie* evidence that the deed was sealed. The comments of the several judges before whom the case was heard were as follows: BOVILL, C. J., "To constitute a sealing, neither wax nor wafer, nor a piece of paper, nor even an impression, is necessary. There is something attached to this deed which may have been intended for a seal, but which from its nature is incapable of retaining an impression. Coupled with the attestation and the certificate, I think we are justified in granting the application that the deed and other documents may be received and filed by the proper officer pursuant to the statute." BYLES, J., "I am of the same opinion. The sealing of a deed need

¹ Bates v. Boston & N. Y. Cent., etc., Co., 100 Mass. 444; Cruise Dig. tit. 32, R.R. Co., 10 Allen, 251.

² Royal Bank v. Junction, etc., R.R.

not be by means of a seal. It may be done with the end of a ruler, or anything else. Nor is it necessary that wax should be used. The attestation clause says that the deed was signed, sealed, and delivered by the several parties, and the certificate of the two special commissioners says that the deed was produced before them, and that the married women acknowledged the same to be their respective acts and deeds. I think there was *prima facie* evidence that the deed was sealed." SMITH, J., "Something was done with the intention of sealing the deed in question. I concur in granting this application, on the ground that this attestation is *prima facie* evidence that the deed was sealed, and that there is no evidence to the contrary."¹

§ 95. When corporate seal indispensable.—A corporation will not be bound by an instrument required to be under seal, unless its seal is affixed thereto; the private seal of an agent authorized to contract in behalf of the corporation not being sufficient.² Conveyances of land executed by A. B. in behalf of the New England silk corporation, reciting that A. B. acted for the corporation and as its treasurer duly authorized to execute the conveyances, signed and sealed by him, with the words "Treasurer of the New England Silk Company" added to his name, and acknowledged by him as his acts and deeds, were held not to constitute them the deeds of the corporation. "He should have executed the deeds in the name of the company. He should also have affixed to them the seal of the company, and have acknowledged them to be the deeds of the company."³ A paper purported to be a conveyance from the president and directors of the Miami Exporting Company. It was executed by C. S. as president in his own name and

¹ *In re Sandilands* L. R. C. P. 411.

² *State v. Allis*, 18 Ark. 269; *Frend v. Dennett*, 27 L. J. C. P. 314.

³ *Brinley v. Mann*, 2 Cush. 337, per METCALF, J., referring to 1 Crabb on

Real Property, secs. 703, 705; 4 Kent Com. 3d Ed. 451; *Stinchfield v. Little*, 1 Greenlf. 231; *Savings Bank v. Davis*, 8 Conn. 191; 3 Stewart on Conveyancing, 189.

under his own seal as president. It was held that as it was not executed by the president and directors under the seal of the corporation, it was not operative as a conveyance.¹ A lease executed by the trustees of a town was held void for want of the corporate seal. "The mode of assenting to and authenticating acts of a corporate body which uses a seal, is to affix the seal with a declaration that it is the seal of the corporation, and to verify the act by the signatures of the president and secretary of the corporation."²

But a corporation, as well as an individual, may adopt and use any seal, and, in sealing, it is not necessary to say "our common seal."³ Thus, a corporation not having adopted any corporate seal by resolution, and not in fact having a seal previous to the execution of a mortgage, the trustees adopted the seal affixed opposite to the name of the president as the seal of the corporation for the time being, and it was held sufficient.⁴ Where the records did not show that any seal bearing an impression was ever adopted by a vote of the corporation, it was held that the fact that the seal of a particular description had been annexed to three deeds of the corporation at different times, did not prove it to be the corporate seal to the exclusion of any other mode of ensealing an instrument.⁵

§ 96. **Proof of corporate seal.**—The seal of a corporation does not prove its own authenticity, but evidence must be given that it is such in fact.⁶ Therefore, a seal purporting to be that of a foreign corporation is not admissible in evidence without proof that it is such seal; nor can it be shown by comparison with a similar seal previously proved.⁷ The mere production in court of a diploma of

¹ Hatch v. Barr, 1 Ohio, 390.

² Kinzie v. Chicago, 2 Scam. Ill. 187.

³ Mill Dam Foundry v. Hovey, 21 Pick. 417; Porter v. Androscoggin, etc., R.R. Co., 37 Me. 349.

⁴ Baptist Soc. v. Clapp, 18 Barb. 35.

⁵ Stebbins v. Merritt, 10 Cush. 27.

See Sherman v. Fitch, 98 Mass. 59; Taylor v. Heggie, 83 N. C. 244.

⁶ Den v. Vreelandt, 2 Halst. 352; Jackson v. Pratt, 10 Johns. 381.

⁷ Chew v. Keck, 4 Rawle, 163. In

doctor of medicine under the seal of an university is not of itself evidence that the party named in the diploma is entitled to such a degree. As an original act, it should be proved that the seal affixed is the seal of the university. If considered a copy, it should have been compared with the original by the witness who produces it.¹ The court cannot say upon inspection that it is the seal of the corporation, any more than it could say that the signature of the president was genuine upon a like inspection.² The officer or agent who signs a deed in the name of the corporation and affixes the seal is the party executing the deed. He stands also in the character of a subscribing witness, and may be examined to prove that the seal affixed by him is the seal of the corporation.³ It is not, however, necessary to prove the seal of a corporation in the same manner as the seal of an individual; that is, by producing a witness who saw the seal affixed to the identical instrument. If the corporation has adopted a peculiar seal, it may be proved to be the seal

England judicial notice is taken of the corporation of the city of London. Phillipps' Ev., 10th Ed., 624, citing *Woodmass v. Mason*, 1 Esp. 53; *Moises v. Thornton*, 8 Term Rep. 307; *Collins v. Carnegie*, 1 Ad. & Ell. 625; *Cooch v. Goodman*, 2 Q. B. 580. "London is a corporation of high antiquity. Its customs are confirmed by *Magna Charta* and several acts of Parliament. It is the great emporium of the kingdom; the seat of all of the principal courts of justice. It has under it several courts vested with great powers, and its authority and antiquity may well entitle it to the privilege of having its seal admitted as evidence in itself in all of the courts of the realm. Lord Kenyon may therefore be warranted in saying that the common seal of London proves itself, and we in our practice have uniformly done the same. But there is nothing in his opinion ex-

tending the doctrine to other corporations more recent in their origin and more limited in their authority." *Den v. Vreelandt*, *supra*, per KINSLEY, C. J. In *Rex v. Bathwick*, 2 B. & Ad. 648, in which it was held that the seal of a bishop to a certificate of ordination was not to be regarded as his corporate seal, it was intimated by Lord TENNERDEN, C. J., that seals of corporations being of a permanent nature, and therefore capable of being proved at any distance of time from the date of the instrument to which they were affixed, were not within the principle of the rule which dispensed with the proof of private seals affixed to instruments thirty years old.

¹ *Moises v. Thornton*, 8 Term Rep. 303.

² *Mann v. Pentz*, 2 Sandf. Ch. 257.

³ *Lovett v. Steam Saw-Mill Assoc.*, 6 Paige Ch. 54.

of the corporation by any one who is acquainted with the device or motto.¹ The mode of proof is to show that the seal was affixed as a corporate seal by some officer, agent, or other person duly authorized. When thus proved, the burden is on the party objecting, to show that the seal was used without proper authority.² If the corporate seal be affixed to an instrument and the signatures of the proper officers shown, courts will presume that the officers did not exceed their authority. The question as to the power of a corporation to do a thing is, of course, different, and in that case the affixing of the seal will be no evidence of authority. But when an act is within the power of a corporation, and its existence is proved by an instrument clothed with all of the requisite formalities, there is no hardship in the rule which imposes on a person objecting to its validity the necessity of showing that it was done without the assent of the body claimed to be represented,³ especially when the seal is shown to have been affixed by an officer intrusted by the corporation with the custody of it.⁴

¹ Foster v. Shaw, 7 Serg. & Rawle, 135; Leazure v. Hillegas, *Ibid.* 313; Tenney v. Lumber Co., 43 N. H. 343. Where a lease purporting to have been attested by the mayor and common council was proved by the subscribing witness without objection, it was held that there was evidence to go to the jury, and no negative evidence having been given, a verdict supporting the lease was sustained. City Council v. Morehead, 2 Rich. 430.

² Clarke v. Imperial Gas Light Co., 4 B. & Ad. 315; Hill v. Manchester, etc., Water Works Co., 5 Id. 866; Phillips v. Coffee, 17 Ill. 154; Smith v. Smith, 52 Id. 174; Sawyer v. Cox, 63 Id. 130; Legett v. N. J. Manuf. & Banking Co., Saxton Ch. 541; Stebbins v. Merritt, 10 Cush. 27. See Solomon's Lodge v. Montmollin, 58 Ga. 547; Conine v. Junction, etc., R.R. Co.,

3 Houst. 288; Musser v. Johnson, 42 Mo. 74; Blackshire v. Iowa Homestead Co., 39 Iowa, 624; Morris v. Keil, 20 Minn. 531; Evans v. Lee, 11 Nevada, 194; Union Gold Mining Co. v. Rocky Mt. Nat. Bank, 2 Col. 226; Tenney v. Lumber Co., *supra*.

³ St. Louis Public Schools v. Risley, 28 Mo. 415; Levering v. Mayor, 7 Humph. 553; Hopkins v. Gallatin Turnpike Co., 4 Id. 403; Adams v. Creditors, 14 La. 454.

⁴ Lovett v. Steam Saw-Mill Assoc., *supra*; Benedict v. Denton, Walkers, Mich. Ch. 336; Bank of Vergennes v. Warren, 7 Hill, 91; Evans v. Lee, 11 Nevada, 194; Reed v. Bradley, 17 Ill. 321; Flint v. Clinton Co., 12 N. H. 430. See Jackson v. Campbell, 5 Wend. 571. Where a witness testified that the signatures to the release were respectively in the handwriting of the president and

The presumption of authority to affix to the instrument the seal of the corporation will not be overcome by the mere fact that no vote of the directors authorizing it is shown, since it is often the case that large powers are exercised by corporate officers with the tacit approval of the corporation.¹ But where a corporate seal cannot be affixed to an instrument without express authority previously given, mere evidence that the seal was affixed by an officer of the corporation intrusted with the custody of its seal would not be sufficient proof of due execution.² So, in the absence of a common seal, or of proof of facts and circumstances from which authority to affix a seal may be inferred, the right of officers to execute a conveyance can in general only be established by a resolution entered in the proper book of the corporation which should be in the custody of the secretary.³ On the other hand, if an agent of a corporation have authority to convey or mortgage its property, and he execute the conveyance or mortgage, and affix thereto anything that the law recognizes as a seal when affixed by a natural person, it will presumptively be a good execution by the corporation;⁴ but this presumption may be rebutted, and parol evidence is admissible for that purpose.⁵ Where an instru-

secretary of a corporation, and that they resided out of the State, it was held *prima facie* evidence of the execution and seal. *Josey v. Wil. & Man. R.R. Co.*, 12 Rich. 134. The rule that an instrument executed under the corporate seal and signed by the proper officers is *prima facie* evidence of due execution by the corporation, is as applicable to an ecclesiastical corporation as to any other. *Bowen v. Irish Pres. Cong. of N. Y.*, 6 Bosw. 245.

¹ *Union Gold Mining Co. v. The Bank*, 2 Col. 226; *Northern Cent. R.R. Co. v. Bastian*, 15 Md. 494.

² *Johnson v. Bush*, 3 Barb. Ch. 207. In the case of *St. Mary's Church*, 7

Serg. & Rawle, 530, *TILGHMAN, C. J.*, held that the court had an undoubted right to look beyond the seal and inquire in what manner and by what authority it was affixed. After supposing a number of cases in which great injury might arise from the adoption of a contrary principle, he added that in all these cases it was too clear to admit of argument that the court would have done flagrant injustice if it had suffered the seal to preclude an examination.

³ *Southern Cal. Colony Assoc. v. Bustamente*, 52 Cal. 192.

⁴ *Johnston v. Crawley*, 25 Ga. 316.

⁵ *Koehler v. Black River Falls Iron Co.*, 2 Black. 715.

ment purporting to be a mortgage of a corporation was signed by the president and secretary, but neither of them had any knowledge of the way in which the mortgage became sealed, it was held that the burden of proof was on the mortgagee, to show the circumstances under which the instrument was in fact sealed, and that it was rightfully and properly done.¹

When the mode of execution is fixed by law, it must, of course, be followed. A statute having provided that conveyances must be executed pursuant to a vote of the corporation to be recited in the deed, an instrument with the corporate seal affixed, purporting to be the deed of the corporation, was signed by a person describing himself as chairman of the corporation, and all of the other corporators also executed the deed, but no vote was recited therein, nor did any such vote appear on the records of the corporation. It was held that the deed was not binding on the corporation, notwithstanding a certificate of the oath of the chairman was annexed to the deed, that the seal was that of the corporation, and was affixed by its authority.²

When the management of the affairs of the corporation is given to a board of directors, the president or other officer cannot do any act requiring the use of the corporate seal without being authorized by the directors.³ If the act of incorporation authorizes the company at any general or special meeting to order and dispose of the custody of its common seal, and its use and application, the company is not required to concur in each act of sealing, but a general authority from the company to an officer or agent to affix

¹ Koehler v. Black River Falls Iron Co., 2 Black. 715.

² Isham v. Bennington Iron Co., 19 Vt. 230. The provision of the statute of Minnesota, Genl. Sts., ch. 40, sec. 2, that "every corporation authorized to hold real estate, may convey the same by an agent appointed by a vote for

that purpose," was held not to exclude the practice of a conveyance by the corporation through one or more of its regular officers without such vote. Morris v. Keil, 20 Minn. 531.

³ Hoyt v. Thompson, 5 N. Y. (1 Seld.) 320.

the seal will be sufficient.¹ The affixing of the seal being merely a ministerial act, it may be done by a less number than is first competent to enter into the contract, provided it is by direction of a legal quorum. Whether or not the seal was in fact affixed by persons having no authority, is a question for the jury.² Officers or members of the body who are competent to affix the seal, are also competent to acknowledge the instrument.³ Where the question is, whether a seal has been forged, seal engravers may be called to show the difference between a genuine impression and that supposed to be false.⁴

§ 97. **Form of executing instruments.**—The precise language employed is not important, provided it is clearly made to appear that the act is done by the principal.⁵ The question in such cases is purely one of construction, the inquiry being whether it is in fact the act of the principal.⁶ A deed was held to be that of the corporation which concluded in these words: "In testimony whereof said parties of the first part have caused these presents to be signed by their president, and their common seal to be hereunto affixed. S. S., President."⁷ The obligatory portion or body of a bond was in the name of a board of education and its successors in office. The concluding clause was as follows: "In witness whereof the president, inspectors, and secretary of said board of education have hereunto set their hands and seals, the day," etc. The signatures were of one per-

¹ Hill v. Manchester, etc., Waterworks Co., 5 B. & Ad. 866.

² Berks & Dauphin Turnpike R. v. Myers, 6 Serg. & Rawle, 12.

³ Gordon v. Preston, 1 Watts, 385.

⁴ 1 Phillipp's Ev., 10th Ed. 780.

⁵ Wilks v. Back, 2 East. 142.

⁶ It has been held immaterial whether the instrument is signed A. B. for C. D., or C. D. by A. B. Roberts v. Button, 14 Vt. 195. But the contract must appear to be executed in the name

of the principal, or the agent will be liable.

⁷ Haven v. Adams, 4 Allen, 80. In Brinley v. Mann, 2 Cush. 337, the language was as follows: "In witness whereof, I, (the treasurer,) in behalf of said company, as their treasurer, have hereunto set my hand and seal"; thus making it his deed sealed with his seal in behalf of the principal, instead of the deed of the principal sealed with their seal.

son, "president," four others "inspectors," and the attestation by one as "secretary," a scroll being attached to each signature. The question was, whether, by the language of the ensealing clause, the bond was made the act of the individuals signing it, or was the bond of the corporation. The court said: "We think the latter view must obtain; it would have been more accurate, undoubtedly, to have used the corporate style of the defendant in the ensealing clause, but we think there is nothing in the language used which is inconsistent with the body of the bond purporting to be the bond of the board of education. No individual is named in the ensealing clause, but only certain officers by their titles, and these the officers of the board, who must or may sign the bond to constitute it the bond of the obligor."¹ An instrument in the name of the proprietors of a township which closed as follows, "In witness whereof, the said proprietors, by their committee aforesaid, who subscribe this deed in the name and behalf of said proprietors, have hereunto set their hands and seals," was held binding on the proprietors.² A deed signed and sealed by a person as president and trustee of a company granted "all the estate, right, title, interest, claim, or demand of the party of the first part and of his constituents." The covenants of the deed were as follows: "The party of the first part, for himself, his constituents, etc., does covenant," etc. It was held that the intention of the parties, gathered from the whole deed, was, that it should pass whatever title was in the grantor, either personally or as trustee.³ Where two trustees composing a corporation signed their names separately to a lease, and affixed the corporate seal separately to each name, it was held a good execution of the lease.⁴ An act of New York⁵ authorized the inhabitants

¹ Wiley v. Board of Education, 11 Minn. 371, per McMILLAN, J.

² Decker v. Freeman, 3 Me. 338.

³ Vilas v. Reynolds, 6 Wisc. 214.

⁴ Jackson v. Walsh, 3 Johns. 226.

⁵ Session Laws of 1821, p. 173, sec. 12.

of a town to elect three trustees whose duty it should be to take charge of the gospel lot of the town, and they and their successors were declared to be a corporation with power to take possession of the lot, and lease or sell it. It was held that a deed of the lot in which the grantors described themselves as the trustees of it, and then signed and sealed the conveyance in their individual names, vested the title in the grantee.¹ And in a late case in North Carolina, where the officers of a corporation, there being no corporate seal, executed a conveyance of land with their individual seals annexed to each name, it was held a valid execution of the deed by the corporation.²

There is, however, a numerous class of cases where one contracting under seal professedly on the part and in behalf of another, but signing his own name, and affixing his own seal, has been held personally liable; upon the ground that if one executes a contract under seal on the part and in behalf of another, and does not intend to bind himself personally, he must execute the contract in the name, and affix the seal of the principal.³ A deed was executed by C. in

¹ *Dezeng v. Beekman*, 2 Hill, 489.

² *Taylor v. Heggie*, 83 N. C. 244.

³ When a contract is entered into, or a deed executed in behalf of the government by a duly appointed public agent, and the fact so appears, notwithstanding the agent may have affixed his own name and seal, it is the contract or deed of the government which alone is responsible, and not that of the agent. But the same rule does not obtain in relation to the agent or attorney of a private person or corporation. It seems to have been settled or recognized as law in courts of justice by judges distinguished for their wisdom and learning in successive generations, and under different governments, that in order to bind the principal or constituent and make the instrument his deed, the agent or attorney must

set to it the name and seal of the principal or constituent, and not merely his own. In the year 1614 it was resolved in *Combe's Case*, 9 Co. 76, that "when any one has authority as an attorney to do any act, he ought to do it in his name who gives the authority; and the attorney cannot do it in his own name, nor as his proper act, but in the name and as the act of him who gives the authority." There, however, the act done by attorney was the surrender in court of certain copyhold lands, in doing which, as is well known, neither signing nor sealing constituted any part of the ceremony. A case where a question relating to the receiving of such a surrender was agitated, came before the Court of King's Bench in 1701, *Parker v. Kett*, 1 Ld. Raym. 658, in which Lord Chief Justice HOLT seems

his own name, sealed with his seal, and acknowledged by him as his act. It was, however, stated in the deed that C. acted in behalf of the New England Silk Company, and that he was duly authorized to execute it as its treasurer.

to have been dissatisfied with the rule in *Combe's Case*, and expresses the opinion that though the act were done in the attorney's own name, provided he had sufficient authority, it would be good without reciting his authority, though not so regular and formal. The rule, however, as laid down in *Combe's Case* is cited by Baron COMYN as good law. *Com. Dig. Atty. c. 14*, and *Rol. 330*, are quoted as supporting it. Upon the same authority it is stated that if an attorney has a power by writing to make leases, if he makes a lease in his own name it will be void. This latter principle was recognized as law in 1726 in *Frontin v. Small*, 2 *Ld. Raym.* 1418. In that case also the attorney in the body of the instrument for and in the name and as attorney of the principal demised, etc.; but the court held that a person empowered by warrant of attorney to execute a deed for another, must execute it in the name of the principal. In conformity with this decision is the language of Lord C. J. KENYON in 1795 in *White v. Cuyler*, 6 *D. & E.* 176, that in executing a deed for the principal under a power of attorney, the proper way is to sign in the name of the principal. At a still later period, in 1802, in *Wilkes v. Back*, 2 *East.* 142, the doctrine that an attorney must execute his power in the name of his principal, and not in his own name, was recognized by the whole court as sound law. The same rule seems to obtain also in the courts of law in this country. Thus, in *Simond v. Catlin*, 2 *Caines*, 66, KENT, C. J., not only admits the authority of *Frontin v. Small*, but adds that when a man acts in contemplation of law by

the authority and in the name of another, if he does an act in his own name, although alleged to be done by him as attorney, it is void. So also in *Fowler v. Shearer*, 7 *Mass.* 14, PARSONS, C. J., in delivering the opinion of the court says that if an attorney has authority to convey lands, he must do it in the name of the principal and not of the attorney, otherwise the conveyance is void. And it is not enough for the attorney in the conveyance to declare that he does it by attorney, for he being in the place of the principal, it must be the act and deed of the principal done and executed by the attorney in his name. In *Elwell v. Shaw*, 16 *Mass.* 42, this subject was again brought before the court. There the deed in question commenced with a recital at full length of a power of attorney from Jonathan to Joshua Elwell; and the attorney professing to act only by virtue of that power, proceeded to convey, etc., and then concluded, "In testimony whereof I have hereunto set the name and seal of the said Jonathan," etc., but affixed his own name and seal. The court in delivering the opinion said it was impossible that any one should doubt the intention of the parties. But, yielding to the weight of authority, it held that the deed was not that of Jonathan. The foregoing principles were reaffirmed in *Stinchfield v. Little*, 1 *Me.* 231. But it was afterward provided by statute in Maine that deeds and contracts executed by an agent either in the name of his principal by the agent, or in the agent's name for his principal, should be deemed the deed or contract of his principal. *St. of Me. of 1823*,

It was held not sufficient ; that the deed should have been executed in the name of the company, the seal of the company affixed to it, and the instrument acknowledged to be the deed of the company.¹ Where a deed was signed by the names of Moulton and Hutchinson, with no addition, in the body of which they described themselves as "the proprietors and owners of all of the shares of the Woodstock Manufacturing Company," it was held not the deed of the corporation. The court said: "It is true that one who owned all of the shares might control the corporation, and so he could if he owned a majority of the shares. But he could in either case do it only by a vote at a meeting held in strict accordance with the statutes of the corporation. This in the present case was not attempted, and the deed is what its terms import, that of Moulton and Hutchinson in their private capacity as the owners of all of the shares in the corporation, for the same reason that any man who professes to convey the title to land or other property does it as owner of that property."² Three persons, who with six others were trustees of a religious society, signed a promissory note individually, with a stamp or impression opposite their names in the form of a circle, within which were the words, "Second Presbyterian Church, Poughkeepsie, 1835"; such a society having been incorporated under a general statute of that year. The note was held the personal undertaking of the signers.³ While some of the decisions to the

ch. 220; Rev. Sts. of Me., ch. 91, sec. 14. See *Roberts v. Button*, 14 Vt. 195; *Bank of Middlebury v. Rutland, etc., R.R. Co.*, 30 Id. 159.

¹ *Brinley v. Mann*, 2 Cush. 337. *Warner v. Mower*, 4 Vt. 385, was decided upon a statute authorizing certain corporations to convey real estate by a deed of their president, sealed with his seal. An agent of a corporation contracting for the use of it, is not personally liable although the contract

be under seal. *McDonough v. Templeman*, 1 Har. & Johns. 156. A mortgage of personal property, purporting to have been given by a corporation, is good, notwithstanding it is signed by the president, and sealed with his private seal. *Sherman v. Fitch*, 98 Mass. 59.

² *Wheelock v. Moulton*, 15 Vt. 519.

³ *Farmers' & Manf. Bank v. Haight*, 3 Hill, 493. See *Mitchell v. Union Life Ins. Co.*, 45 Me. 104. *Mitchell v.*

effect that members have made themselves personally liable on contracts entered into in behalf of a corporation by executing them in their own names could scarcely have held otherwise on any reasonable construction, other decisions seem clearly opposed to well-established principles of interpretation.¹

§ 98. **Recognition of agent's authority.**—The power to make contracts, including conveyances of land belonging to a corporation, when not vested by the charter in persons named in it, must be exercised by the body at large through agents appointed and specially authorized by the corporation. The appointment of an agent cannot always be shown by a written vote, and consequently it may be inferred or implied from the adoption or recognition of his acts

St. Andrew's Bay Land Co., 4 Fla. 200, was an action against the corporation upon an instrument commencing, "This memorandum of an agreement made and entered into between," etc. (naming the corporation and Mitchell), "witnesseth, that the said company has this day," etc. (setting out the contract), "signed, sealed, and delivered, duplicates this 11th day of May, 1841," signed, "St. Andrew's Bay Land Company," with the names of the committee, with a seal affixed to each, "N. H. Mitchell," (seal). The defendants pleaded that the members of the committee were not authorized to execute the instrument under the corporate seal. The court, per ANDERSON, C. J., said: "The question is, can an action of covenant be sustained against the St. Andrew's Bay Land Company on the indenture here described? . . . The defendants certainly did not execute the indenture by themselves, and the only inquiry is, whether they executed the deed under seal by some other person. The declaration says the indenture was sealed with the respective seals of Long,

Nickles, and Buck; and though it is alleged these persons were duly authorized by the land company, such allegation can only mean that they were authorized to make the agreement, not to affix the seal of the company; and what is still more material, there is no allegation that the seal of the company was affixed, and no such seal is in fact affixed to the agreement which is appended to the declaration. The committee might have been empowered to make the agreement, and having made it the company would be fully responsible for a breach of it to the plaintiff in some form of action, but surely not in an action of covenant which cannot be maintained except against a person who has executed a deed under seal. The private seals of the company are not the seals of the corporation, and consequently the plaintiff is here suing the defendants in covenant, who, according to his own showing, have not executed a deed under seal."

¹ See remarks of BELL, C. J., in *Tenney v. Lumber Co.*, 43 N. H. 343.

by the corporation. The familiar principle that if a person with a full knowledge of the facts, ratifies the doings of another who has assumed to act in his behalf, he will be bound thereby as fully as if he had originally conferred the authority upon him, is as applicable to corporations as to individuals.¹ Accordingly, although no resolution or order of a corporation can be produced authorizing one of its officers to execute a written contract in its behalf, and the seal used was his private seal, evidence may be introduced to show that he had authority, or that his act was afterward ratified by the corporation.² Certain persons were authorized, by a resolution passed by the board of trustees of an incorporated collegiate institute, to contract for furnishing the materials and doing the work requisite for the erection of an edifice. They accordingly entered into a written contract, under their respective hands and seals, for the brick, describing themselves and signing it as the "Building Committee." The corporation having ratified the contract in fact by making several payments on it, it was held binding on the corporate body, notwithstanding the seals of the parties signing it were affixed thereto. SMITH, J., said: "If this contract were by parol, no doubt, I think, would exist, or question be made, in respect to its being a valid and binding contract of the corporation. The fact that the defendants sealed it with their seals creates all the difficulty in the case. As a deed it is not the deed of the corporation confessedly. It is not signed by the appro-

¹ Gordon v. Preston, 1 Watts, 385; Com. Bank of Buffalo v. Kortright, 22 Wend. 348.

² Eureka Co. v. Bailey Co., 11 Wall. 488. In Magill v. Kauffman, 4 Serg. & Rawle, 317, it was held that the acts and declarations of the trustees of a religious corporation while transacting its business, and also what passed at meetings of the congregation when assembled on business, might be proved

to show its possession of land and the extent of its claim. "This," said STORY, J., in commenting on that decision, "must necessarily have proceeded upon the ground that the acts of corporate agents, and even of aggregate bodies corporate, may be established independent of written minutes of their proceedings." See U. S. Bank v. Dandridge, 12 Wheat. 64.

priate officers of the corporation, and is not under the corporate seal. An action of covenant, according to the former names and forms of actions, clearly would not lie against the corporation. Strict principle, I think, would require in the practical application of the rule that the agent must see to it, in making his contract, that he binds his principal; that he binds such principal in the manner and form in which he contracts, so that the other party to the contract may have his appropriate remedy by action in form on the contract itself. But this rule has been departed from too long, and in too many cases, for any but a court of ultimate review and of final decision to return to first principles."¹

In applying the principle of ratification to a particular case, care must be taken that other principles of the law are not violated. No sort of ratification can make good an act without the scope of the corporate authority. So where the charter, or a statute binding upon the corporation, has committed a class of acts to particular officers or agents other than the general governing body, or where it has prescribed certain formalities as conditions to the performance of any description of corporate business, the proper functionaries must act and the designated forms be observed, and as a rule no act of recognition can supply a defect in these respects.² Where the members of a com-

¹ *Haight v. Sahler*, 30 Barb. 218. Where a committee of a municipal corporation entered into a written contract with a party under the respective hands and seals of the members of it, and the corporation recognized their authority to make the contract, it was held that the members of the committee were not personally liable, but that an action of assumpsit would lie against the corporation. *Randall v. Van Vechten*, 19 Johns. 60. Approved in *Dubois v. Del. & Hudson Canal Co.*, 4 Wend. 288; *Brockway v. Allen*, 17 Id. 40;

Gale v. Nixon, 6 Cowen, 448; *Hicks v. Hinde*, 9 Barb. 529; *Stanton v. Camp*, 4 Id. 276. The principle upon which these cases rest is that the contract is in fact authorized by the principal, and that a seal is unnecessary to its validity. *Lawrence v. Taylor*, 5 Hill, 107. The subject was elaborately discussed by PAGE, J., in *Worrall v. Munn*, 5 N. Y. (1 Seld.) 229, and *Randall v. Van Vechten*, cited and approved.

² *Peterson v. Mayor, etc., of N. Y.*, 17 N. Y. 449.

mittee, which was appointed by the directors of an incorporated turnpike company, entered into a written agreement, under their hands and seals, to pay a person for the construction of part of the turnpike, it was held that they were personally liable. The court said: "To the agreement the defendants have not, if they had legal authority, put the seal of the directors, or the seal of the corporation, but have put their own seals. It is therefore their deed; and if it be not their covenant, it is not the covenant of any person or corporation; and the apparent intent of the plaintiff to have his payments secured by a covenant will be defeated. The defendants do not describe themselves as a committee of the corporation, but of the directors appointed to contract. The corporation is therefore not bound by this contract, unless it gave the directors, its immediate agents, a power to substitute agents under them by whose contracts it should be bound. But this does not appear; and we cannot presume it without some evidence. The directors are not a corporation, but the agents of one, and are answerable for their personal contracts as private persons. The contract before us is a contract of some individual persons for others; and if they have bound themselves, they must look to their principals for indemnity."¹ In *Bank of Columbia v. Patterson*,² a contract had been executed under seal between Patterson and a committee of the directors of the bank for the construction of a bank building. The work having been done, Patterson, instead of bringing his action against the committee upon their express contract, brought *indebitatus assumpsit* against the bank. It was held, upon error to the

¹ *Tippets v. Walker*, 4 Mass. 595. In Massachusetts, it has been held that bank directors may delegate authority to a committee of their own number to alienate or mortgage real estate; that an authority to convey necessarily implies an authority to execute suitable

and proper instruments for that purpose; and in case of a corporation, to affix the corporate seal to an instrument requiring it. *Burrill v. Nahant Bank*, 2 Metc. 163.

² 7 Cranch, 299.

circuit court, that though an action might have been sustained against the committee personally, yet, as the whole benefit resulted to the corporation, the jury might legally infer from the evidence in the case that the corporation had adopted the contract of the committee, and had voted to pay for the whole sum which should become due under the contract, and that the plaintiff had accepted its engagement. If directors of a corporation may transact business as such by a vote of the board at a meeting held in another State, and may authorize persons to execute a conveyance of real estate, yet it will be necessary to show that they were legally chosen directors, before any conveyance made by their direction can be considered legal.¹ It is not necessary that authority to execute a mortgage in behalf of a corporation should be given by a formal vote. Such an act by the president and general manager of the corporate business, with the knowledge and consent of the directors, or with their subsequent and long-continued acquiescence, may properly be regarded as the act of the corporation. Authority in the agent of a corporation may be inferred from the conduct of its officers, or from their knowledge and neglect to make objection, as well as in the case of individuals.²

§ 99. **Legal effect of affixing seal.**—The seal of a corporation, when affixed to any deed or contract by proper au-

¹ *Miller v. Ewer*, 27 Me. 509.

² *Sherman v. Fitch*, 98 Mass. 59, per WELLS, J., referring to *Emmons v. Providence Hat Manf. Co.*, 12 Mass. 237; *Melledge v. Boston Iron Co.*, 5 Cush. 158; *Lester v. Webb*, 1 Allen, 34. A power to sell includes a power to mortgage; and the words, "dispose of," in the act of incorporation, leave no doubt of the existence of an intent to give the corporation power to part with its real estate by any voluntary act, without regard to its mode of oper-

ation. *Gordon v. Preston*, 1 Watts, 385. Acts or acquiescence do not, as is sometimes carelessly said, ratify an unauthorized contract; but in the more guarded and philosophical language of the better authorities, they authorize judges and juries to presume consent or ratification. Certain conduct, according to the usual experience of human nature or of business, ordinarily accompanies or indicates consent or approval.

thority, is not distinguishable in its legal effect from that of an individual. The one is the seal of an artificial, the other of a natural person. It makes the instrument a specialty, and affords the highest evidence of the deliberate assent of the party to the deed or contract thus executed.¹ The principle that an instrument under seal imports a consideration, applies as strongly to a corporation acting within its powers as to an individual.² If a promissory note made by a corporation be attested by its officers with the corporate seal, which is not usual, the negotiable character of the note is not thereby destroyed.³ The doctrine that simply affixing a seal is tantamount to both signing and sealing, especially with respect to corporations, which, it was said, could only speak by their common seal, has become obsolete.⁴ Although the affixing of the seal to the deed of a corporation be sufficient to pass the estate without a formal delivery, if done with that intent, yet it will have no such effect when the order to affix the seal is accompanied with a direction to the agent of the corporation to retain the conveyance until accounts are adjusted with the purchaser.⁵ The validity of the seal, like any other question of obligation or construction, belongs to the *lex loci contractus*, and not to the *lex fori*.⁶

§ 100. Answer must be sealed.—A corporation aggregate answers under the seal of the corporation. The practice is in accordance with the ancient, though, as already stated, obsolete, rule of the common law, that a corporation, being an invisible body, acts and speaks only by its common seal.

¹ Clark v. Woolen Manf. Co., 15 Wend. 256; Benoist v. Carondelet, 8 Mo. 250; Porter v. Androscoggin R.R. Co., 37 Me. 349. See Levering v. Mayor, etc., of Memphis, 7 Humph. 553.

² Sturtevant v. City of Alton, 3 McLean, 393; Royal Bank of Liverpool v.

Grand Junction R.R. Co., 100 Mass. 445; 2 Bouv. Inst. 390.

³ Bank v. R.R. Co., 5 Rich. 156.

⁴ Isham v. Bennington Iron Co., 19 Vt. 230.

⁵ Derby Canal Co. v. Wilmot, 9 East. 360.

⁶ Curtis v. Leavitt, 15 N. Y. 9; s. c. 17 Barb. 309.

If the practice in this particular be departed from, and the use of the seal be dispensed with, it should be by leave of the court previously obtained for good cause. If the corporation have no common seal, any seal or impression indicative of a seal may be adopted and the answer verified in the usual form by the signature of an officer of the corporation, with his affidavit that the seal so affixed is the seal of the corporation, and was affixed by its authority.¹

¹ Daniell's Ch. Pr. 146; Ransom v. (2 Beasley) 212; Bronson v. La Crosse Stonington Savings Bank, 13 N. J. Ch. R.R. Co., 2 Wall. 302.

CHAPTER VIII.

CORPORATE AGENTS.

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| <p>§ 101. Necessity of.</p> <p>102. Method and power of appointment.</p> <p>103. Proof of appointment.</p> <p>104. When an agency will be presumed.</p> <p>105. Security for good behavior.</p> <p>106. Liability of sureties on official bond.</p> <p>107. Release of surety.</p> <p>108. Officers <i>de facto</i>.</p> <p>109. Ratification of unauthorized acts.</p> <p>110. Appointment of sub-agents.</p> <p>111. General rule as to liability on written instruments.</p> <p>112. Liability of principal on sealed instrument.</p> <p>113. Liability of principal on simple contracts.</p> <p>114. Liability of agent on written instrument.</p> <p>115. Liability of principal for fraud of agent.</p> <p>116. Liability of agent for fraud committed by him.</p> <p>117. Liability of principal for misrepresentations of agent.</p> <p>118. Liability of agent for false representations.</p> | <p>§ 119. Liability of the corporation for the torts of its agents.</p> <p>120. Liability of corporation for negligence of its agents.</p> <p>121. Liability of agents for negligence.</p> <p>122. Rule as to fiduciary relation.</p> <p>123. Power of agent to bind corporation in general.</p> <p>124. General power of directors.</p> <p>125. Limitation of power of directors.</p> <p>126. Power and disability of president.</p> <p>127. Power and disability of cashier or treasurer.</p> <p>128. Power and disability of teller of bank.</p> <p>129. Power and disability of secretary.</p> <p>130. Power and disability of superintendent.</p> <p>131. Pay for services.</p> <p>132. Service of process.</p> <p>133. Who may bring action.</p> <p>134. Statute of limitations.</p> <p>135. Notice to agent.</p> <p>136. Acts and declarations of officers and agents.</p> <p>137. Agency not restricted to place.</p> |
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§ 101. **Necessity of.**—The power of a natural person who is not subject to any special disability to supervise and direct whatever appertains to his own private rights, interests, duties, and obligations, does not of course exist in the case of an artificial and intangible being like a corporation

which in the conduct of its multifarious concerns can only act through the instrumentality of agents appointed and authorized for that purpose.¹ The duties of officers of corporations, where those duties are prescribed by the corporation itself, are in the nature of an agency.² The officers of a joint stock company, incorporated for private purposes and to acquire property, and having the ordinary powers and privileges of other trading companies, possess no private franchise in their offices, but are mere ministerial agents of the company to conduct its business for its benefit and under its authority.³ A director of a corporation, although commonly called an officer, is perhaps not technically to be so considered, but one of the agents of the corporation elected to manage its affairs or some of them.

§ 102. Method and power of appointment.—We have seen⁴ that the appointment need not be by an instrument under seal. Certain agents may be specially designated by the charter or act of incorporation; or the body of corporators be authorized to choose them; or the power of appointment be vested by the charter in a particular board.⁵ But

¹ This self-evident proposition was comprehensively stated by DAVIS, J., in *New York & New Haven R.R. Co. v. Schuyler*, 34 N. Y. 30, thus: "A corporation aggregate being an artificial body—an imaginary person of the law, so to speak, is, from its nature, incapable of doing any act except through its agents, to whom is given by its fundamental law, or in pursuance of it, every power of action it is capable of exercising or possessing."

² *Despatch Line of Packets v. Bellamy Manf. Co.*, 12 N. H. 205.

³ *Burr v. McDonald*, 3 Gratt. 215. In *Protection Life Ins. Co. v. Foote*, 79 Ill. 361, the court in speaking of corporations said: "In the absence of express provisions in their charters limiting the appointment of their officers

and agents or the scope of their powers and duties, it must be presumed that each person in becoming a member of the company impliedly consents that it shall be represented by such officers and agents as are reasonably necessary for the transaction of its business, and that they shall possess the powers and perform the duties ordinarily possessed and performed by such officers and agents."

⁴ *Ante*, ch. 7, sec. 91.

⁵ It is laid down in the old books that corporations by prescription, or those created by letters patent, act only by deed. It is otherwise with respect to corporations created by charter requiring the ordinary business to be done, not by the corporators as an entire body, but by their agents. Bun-

whatever mode of appointment is adopted the charter, if it give directions on the subject, must be strictly followed, though considerable latitude of construction is sometimes permitted where the means to be employed to accomplish the end in view seems to render such a construction proper. The language of the charter of a railroad company being, "the president and managers shall conduct the business of said company," etc., it was held that the purchase of locomotives being part of the business of the company, the president and managers could appoint an agent with power to make such purchases, whether the agent was one of their number or a stranger, and to execute bills or notes of the company in payment of debts thus incurred.¹ A provision in the charter that corporate powers shall be exercised by a board of directors, to consist of a specified number, will be held to import that the board of directors shall have the control and management of the affairs, and that subordinate agencies shall act by the authority and sanction of the board. And this authority and sanction may be gathered from a resolution or by-law of the board or from a course of business with the acquiescence of the directors.²

§ 103. Proof of appointment.—As a general rule, the agency must be proved otherwise than by the mere acts of the

combe Turnp.Co. v. McCarson, 1 Dev. & Batt. 306. See opinion of WILLARD, J., in Moss v. Averill, 10 N.Y. (6 Seld.) 449.

¹ Bank of U. S. v. Dandridge, 12 Wheat. 64; Olcott v. Tioga R.R. Co., 27 N. Y. 546; People's Mut. Ins. Co. v. Westcott, 14 Gray, 440; Johnston v. Jones, 23 N. J. Eq. (8 C. E. Green) 216; Macon, etc., R.R. Co. v. Vason, 57 Ga. 314.

² Hoyt v. Shelden, 3 Bosw. 267; Kitchen v. Cape Girardeau, etc., R.R. Co., 59 Mo. 514. The power to have a board of directors is inherent in all corporations. Hurlbut v. Marshall, 62

Wis. 590. The appointment of an agent must be accepted. Acceptance need not be by direct and positive act. It may be shown by conduct on the part of the appointee indicating an intention to accept, and be implied from circumstances. Cameron v. Seaman, 69 N. Y. 396; Lockwood v. Mechanics' Nat. Bank, 9 R. I. 308; Blake v. Bayley, 16 Gray, 531. Where an appointee to an office was present and recorded the vote, it was held that his acceptance of the office would be presumed. Delano v. Trustees of Smith Charities, 138 Mass. 63.

alleged agent before it can be assumed that such acts are binding on the principal; and the acts of the assumed agent, unaccompanied by any evidence tending to show that the principal had knowledge of or assented to them, are not admissible upon the question of agency.¹ The appointment of agents should be proved when practicable by the records of the corporation. In an action against a corporation to recover money expended by the plaintiff while in the employment of the corporation, he having, as it was alleged, been appointed by a vote of the trustees, it was held that the records of the corporation being the best evidence, should be produced; that the testimony of an officer to show what the votes were, or the authority conferred by them, could not be received; that if the plaintiff desired to prove any facts which appeared of record, he should have notified the corporation to produce the books, and if they had not been produced, he might then have given parol evidence of the votes of the trustees.² To establish a resulting trust in real estate in favor of a corporation, the authority of a committee of the corporation to act in its behalf can only be shown by its records.³ The books to be admissible in evidence must be first shown to be those of the corporation. If the secretary is living, the books ought to be in his custody; but after his death any member of the corporation may have their rightful possession, and such possession from the necessity of the case would be sufficient to justify their introduction. All of the entries need not have been made by the secretary; but such as have been made by any person acting for him in his necessary absence will be good.⁴ Where the whole evidence consisted of the fact that the book was in the handwriting

¹ Talladega Ins. Co. v. Peacock, 67 Ala. 253.

² Haven v. N. H. Asylum, 13 N. H. 532. See Owings v. Speed, 5 Wheat. 714; Buncombe Turnp. Co. v. McCarrson, *supra*.

³ Meth. Epis. Corp. v. Herrick, 25 Me. 354.

⁴ Smith v. Natchez Steamboat Co., 1 How. Miss. 492.

of one H., who appeared from the entries in the book, but in no other way, to have been secretary to the board, it was held that there was no legal proof of the authenticity of the book as that of the corporation, or that it had been regularly kept as such by the proper officer.¹ A corporation relying upon its own records to establish its acts, with all of the evidence of correctness at its command, should be held to strict proof. Proving that the book was kept by the corporation as a record of its proceedings, would not be a sufficient authentication of its proceedings without further evidence to show that the entries were made by the proper officer. As a rule, the clerk or officer who made the entries should be called as a witness if he is living, and his handwriting be proved if he is dead.²

The inability to produce the books when called for, authorizes the introduction of secondary evidence ; such as general reputation, and acts of the agent.³ Although, who are the directors of a corporation cannot be proved by mere general reputation,⁴ yet parol evidence is admissible of the choice of directors, and of their acts and doings, after the failure or refusal of the corporation to produce its books upon notice.⁵ It may, of course, be shown that an alleged

¹ Highland Turnpike Co. v. McKean, 10 Johns. 154.

² Whitman v. Granite Church, 24 Me. 236; Stebbins v. Merrill, 10 Cush. 27; Union Bank v. Knapp, 3 Pick. 196; Union Gold Mining Co. v. Rocky Mountain Nat. Bank, 2 Col. 565. Where the charter of an insurance company provided that no losses should be settled or paid without the approval of at least four of the directors, with the president or two assistants, or a plurality of them, the declarations of the secretary of the company that the president and assistants had agreed to accept the abandonment and pay the loss, was held not binding on the company. Beatty v. Marine Ins. Co., 2

Johns. 109. An act having provided that the oath on an appeal from an award of arbitrators should be made by one of certain officers of the corporation named, it was held that it could not be done by another person. Washington, etc., Turnp. Co. v. Cullen, 8 Serg. & Rawle, 517.

³ Clerk v. Farmers' Woolen Manf. Co., 15 Wend. 256.

⁴ Litchfield Iron Co. v. Bennett, 7 Cowen, 234.

⁵ Thayer v. Middlesex Mer. Fire Ins. Co., 10 Pick. 326. Where the directors of an unincorporated joint stock company are elected annually, but it does not appear that the agent is to act for one year only, his appointment is

director declined the appointment. A., on being asked to become a director of a bank about to be established, said he would consent to do so if he could be convinced that a certain portion of the capital had been subscribed, and that the persons named in the prospectus as directors had actually become such. He attended one meeting of the board, and signed a check with one of the directors. Upon receiving, a few days afterward, a letter of allotment of the shares necessary to qualify him, he at once sent it back with his refusal to act as director, for the reason that he was not satisfied upon the two points named by him. The secretary wrote in answer that A.'s resignation had been accepted. It was held that he was not liable as a contributor.¹ The records of a corporation, verified by its clerk, by which it appears that at the annual meeting a person was elected a director for the ensuing year, and that he was afterward present, and made two motions which were put to vote and carried, are *prima facie*, but not conclusive evidence that he accepted the position.²

§ 104. When an agency will be presumed.—The law will infer authority as well from the general character of the acts which the agent has been permitted to do, as from a special written power.³ When it is sought to bind the cor-

during pleasure; and if a bond be given by the agent to the directors, he and his sureties will be liable to an action thereon brought by them, they having ceased to be directors before a breach of the condition of the bond. *Ander-son v. Longden*, 1 Wheat. 85. When the statute provides that a treasurer shall be chosen annually, it is to be understood as meaning, not an exact calendar year, but the official year of such corporation as holds annual meetings, which ordinarily is the term from one annual meeting to another. Where the annual meeting is held on a given day of a week or month, as on the

fourth Monday of March, the intervals will not be precisely equal; or, whenever the time for the annual meeting is legally changed, an official year may be lengthened or shortened. *Chelmsford Co. v. Demarest*, 7 Gray, 1.

¹ *In re Peninsular, etc., Bank*, L. R. 2, Eq. 435.

² *Blake v. Bayley*, 16 Gray, 531.

³ *Exchange Bank v. Monteath*, 17 Barb. 171; *Christian University v. Jordan*, 29 Mo. 250; *Williams v. Christian Female College*, *Ibid.* 250; *Hotch-in v. Kent*, 8 Mich. 526. The rule that the apparent authority of an agent is the real authority, was laid down by

poration by an implied promise, the evidence must show acts of the corporation, or acts of an agent authorized to make the promise, from which the promise may be inferred.¹ If it be objected by the principal that his alleged agent acted without authority, the question to be determined will be, what authority the person who dealt with the agent, and relied on his acts, had a right to suppose the agent possessed.² When a person has the actual charge and management of the general business of the corporation, with the knowledge of the members and directors, it is evidence

Lord ELLENBOROUGH, Ch. J., in *Pickering v. Busk*, 15 East. 38, where he says: "I cannot subscribe to the doctrine that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterward to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect to the subject matter; and there would be no safety in mercantile transactions if he could not." The same presumptions made in cases of private persons are applicable to corporations. Acts of corporations which presuppose the existence of other acts to make them legally operative, are presumptive proof of the latter. A vote of a corporation may be presumed from other acts, though there be no proof of such vote on the records of the corporation. For the neglect of the corporation to record its own doings cannot prejudice the rights of a party relying upon the good faith of an actual vote. Such presumptions operate either for or against a corporation; the true question in such a case being, not which party is plaintiff or defendant, but whether the evidence is the best the nature of the case admits of, and leaves nothing behind in the possession or control of the party higher

than secondary evidence. *Bank of Ky. v. Schuylkill Bank*, Parsons' Sel. Cas. 180.

¹ *Mt. Sterling, etc., Co. v. Looney*, 1 Metc. Ky. 550. See *Moshannon Land, etc., Co. v. Sloan*, 7 Atlantic Reporter, 102. The officers of a transfer company, empowered to engage "in a general freight and transfer business, and such other business as may not be inconsistent therewith," have no right to sign the name of the company to a contract of suretyship in order to guarantee the credit of a third party, nor afterward to sign a letter purporting to assume the payment of the amount stipulated in such contract. *Lucas v. White Line Transfer Co.*, 30 North Western Reporter, 771.

² *Perkins v. Washington Ins. Co.*, 4 Cowen, 645. Where an agent is expressly authorized "to sign all notes and business paper of the company," a *bona fide* holder for value of notes taken before maturity can recover against the corporation, notwithstanding any want of authority of the agent to execute these particular notes for the purposes for which they were given; and it is immaterial whether the agent's authority to give the notes for the company is proved to have been expressly made, or is implied from the mode of signature. *Bird v. Daggett*, 97 Mass.

of his authority, without showing any vote or other corporate act constituting him the agent of the corporation.¹

Although contracts will be implied against a corporation

494. While in an ordinary commercial partnership, any act of one of the partners with innocent parties, within the scope of the partnership business, will usually bind the firm, yet any contract made without the scope of the business, with a person who knows, or is bound to know, that it is beyond that scope, can never be held binding on the firm of its own force, or without some expressed or implied adoption. *Hotchkiss v. Kent*, 8 Mich. 526. It was well said by MAULE, J., in *Smith v. Hull Glass Co.*, 9 Eng. L. & Eq. 442, that where a corporation is carrying on business at a certain place by persons authorized by it, and acting within its apparent knowledge, the case does not differ from that of a transaction in the ordinary course of business at a shop or counting-house. A customer is not obliged to prove the authority of the shopman or clerk with whom he deals. If the persons are acting contrary to the authority of their employés, that is the fault of the latter. The rule that a private agent, acting in violation of specific instructions, yet within the scope of a general authority, may bind his principal, is not applicable to a like act of an agent of a municipal corporation. The latter is clothed with duties and powers specially defined and limited by ordinances bearing the character and force of public laws, ignorance of which can be presumed in favor of no one dealing with him on matters within his official discretion. For this reason the law makes a distinction between the effect of the acts of an officer of the corporation, and those of an agent for a principal in common cases. In the latter, the extent of the authority is necessarily known only to the principal

and agent; while in the former, it is a matter of record in the body of the corporation, or as public law. *Balto. v. Eshback*, 18 Md. 282; *Same v. Reynolds*, 20 Id. 1.

¹ *Goodwin v. Union Screw Co.*, 34 N. H. 378. The general rule is that an agent may be appointed by parol, and a subsequent recognition of his acts is usually sufficient to bind the principal. *Bank of U. S. v. Dandridge*, 12 Wheat. 64; *Yarborough v. Bank of England*, 16 East. 6; *Roe v. Dean of Rochester*, 2 Camp. 96; *Detroit v. Jackson*, 1 Doug. Mich. 106; *Troy Turnpike & R.R. Co. v. McChesney*, 21 Wend. 296; *Warren v. Ocean Ins. Co.*, 16 Me. 439; *Badger v. Bank of Cumberland*, 26 Id. 428; *Bank of Lyons v. Demmon, Hill & Denio*, 398; *Burgess v. Pue*, 2 Gill, 254; *Elysville Manuf. Co. v. Okisko*, 1 Md. Ch. 392. "Acts done by a corporation which presuppose the existence of other acts to make them legally operative, are presumptive proof of the latter." *Burgess v. Pue*, *supra*. "The same presumptions arise from the acts of corporations as from the acts of individuals; consequently, the corporate assent and corporate acts not reduced to writing may be inferred from other facts and circumstances without any violation of any known rule of evidence." *Union Bank v. Ridgely*, 1 Har. & Gill, 426; *State Bank v. Comegys*, 12 Ala. 772. Where the trustees of a corporation voted that "the treasurer be authorized to sign all deeds and instruments for the legal conveyance of real estate under the direction of the committee of investment," it was held that such direction of the committee need not be in writing. *Hutchins v. Byrnes*, 9 Gray, 367.

when it has accepted the benefit of what has been done by the agent in its name, and so has adopted the act, yet there must be authority in the agent to contract or an adoption of the contract, otherwise the corporation is not bound. On the question whether the consent to an assignment of a policy of insurance by the secretary of an insurance company to enable the plaintiff to procure a loan by a mortgage upon the insured property was binding upon the company, the facts were that the agent of one Gridley called at the company's office upon the secretary who was regularly in attendance there to transact their business, and stated to him that Gridley proposed to loan to the company a certain sum of money and take a mortgage upon the insured property, provided he could obtain the consent of the company to the assignment of the policy as security; that the secretary indorsed the consent on the policy; and that the loan was obtained and the mortgage and assignment executed. The secretary testified that he was in the constant habit of giving consent to the assignment of policies for the same purpose, and always supposed he was authorized to do so, and the book of policies where memoranda were entered of such as had been assigned showed that the consent was indorsed in every instance by the secretary. Counsel in their argument insisted that inasmuch as the board never by any formal act gave its sanction, and the by-laws required the consent in writing of the directors to any conditional alienation by mortgage subsequent to the insurance, the consent in this case was unauthorized and void. It was held that the directors were bound to know the uniform course pursued by the sole agent in the transaction of their business at their office, especially where regular entries of his acts were made in their books, and they must be held responsible on the ground of a tacit assent and approval, unless they could show that by strict vigilance and scrutiny into their agent's acts they were un-

able to ascertain the course he was pursuing. JOHNSON, J.: "All that Gridley can be supposed to have known in the case before us would be derived from the face of the policy. There he would only learn that the interest of the assured therein was not assignable without the consent of the company manifested in writing in pursuance of the by-laws and indorsed upon the policy. He accordingly repaired to the office, where he had a right to suppose he could have the consent manifested and indorsed in the proper form. It is done according to the system and in the form adopted and uniformly pursued there by an officer having charge of the business and who supposed this peculiarly within his province. In the faith that all is right he advances his money and receives his mortgage and assignment. No objection is made to this or numerous similar transactions, and even after the fire payment is refused upon an entirely different ground. Clearly, as it seems to me, the company are not now at liberty to dispute or deny the authority of their secretary to indorse the consent in question."¹ In an action against a manufacturing corporation for the value of goods sold and delivered to it, it appeared that the contract for the goods was made by the president of the corporation, and that the articles bought were used by it in its business. A by-law of the defendant, which was offered in evidence, prescribed that no officer, agent, or servant of the company should have power to bind it for the purchase of any article, or to contract any debt for the company exceeding twenty-five dollars in amount, without previous authority from the board of directors. It was not shown that the plaintiff was aware of the existence of such a by-law prior to the sale and delivery of the articles by him. It was held that the validity of the sale could not be questioned.² Where a promissory note

¹ Conover v. Mu. Ins. Co. of Albany,
1 N. Y. (1 Const.) 290.

² Ten Broek v. Boiler Compound
Co., 20 Mo. App. 19.

purporting to have been made by a corporation was signed in the name of the general agent of the company by a clerk in its employ as agent, and it was proved that the note was given for borrowed money, that the clerk was in the habit of executing such notes with its knowledge, and that the borrowed money for which the note was given was used by the corporation in its business, it was held that there was sufficient evidence that the company executed the note to go to the jury.¹ If officers of a corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal evidence of such authority, the acts of such officers will be deemed rightful and the delegated authority be presumed.² Where the cor-

¹ Mead v. Keeler, 24 Barb. 20. See Corn Exchange Bank v. Cumberland Coal Co., 1 Bosw. 436. A deed of settlement by which the directors of a mining company were empowered to act, provided that the affairs and business of the company should be under the sole and entire control of the directors, of whom there should not be less than five nor more than nine, and that three of them should form meetings of the directors, and should, for all purposes, be competent to act, it was held that although the directors had exclusive control with respect to the management of the company, they had no authority to borrow money. Burmester v. Norris, 21 L. J. N. S. 5, Exch. 43; 8 Eng. L. & Eq. 487.

² Bank of Columbia v. Patterson, 7 Cranch, 299. Authority to act in a class of cases may be conferred by a single resolution, as well as a distinct resolution for each case. Elwell v. Dodge, 33 Barb. 336, per ALLEN, J., referring to Howland v. Myer, 3 Comst. 290; Gillett v. Campbell, 1 Denio, 520; Bank of Vergennes v. Warren, 7 Hill, 91. The board of directors of a bank

passed a resolution requiring the cashier so to arrange the duties of the officers of the bank as to give to B., one of the officers, necessary assistance in his department. Under this resolution a written memorandum specifying the duties of each officer, signed by the officers, was left by the cashier on the table of the directors while they were in session, he at the same time informing them of its contents and purpose. No dissent to this assignment of the duties of the officers was expressed by the board nor by any director, and the officers proceeded to discharge their duties in the manner set forth in the memorandum. It was held that it was to be inferred that the board of directors assented to the arrangement. State Bank v. Comegys, 12 Ala. 772. Where an agent is intrusted with authority within a prescribed sphere of action, and is permitted from day to day, without any interference on the part of the principal, to exercise the authority, third parties will not be affected by an understanding between the principal and agent that every act must receive the express approval of

porate seal is proved to have been affixed to an instrument and signed and attested by the officers having the custody of it, whose duty it is, according to the usual course of business, to certify and attest the acts of the corporation, and such officers certify that the instrument is executed pursuant to a resolution of the board of directors, it will be presumed that they were authorized to perform the act; and it is doubtful whether the corporation could, as against one who acted upon the faith of an instrument so attested, and without notice of any want of authority, or that the attestation was not in all respects true, be permitted to impeach it by denying such authority.¹

the principal. *Medbury v. N. Y. & Erie R.R. Co.*, 26 Barb. 564; *Beers v. Phoenix Glass Co.*, 14 Barb. 358. The secretary of a joint stock company is the servant of the directors of the company, who are presumed to have control over him as such; and this presumption is not rebutted by the circumstance that the company has ceased doing business. *Elmes v. Ogle*, 15 Jur. 180; 2 Eng. L. & Eq. 379. The secretary of Company A, which was formed for the purpose of constructing railroads, gave an order by letter to Company B for 500 tons of rails at a certain price to be paid for by three months' acceptances from the date of delivery. The managing director of Company B was also a director of Company A. The rails were designed for the construction of a railroad which the managing director of Company A, and not the company itself, had undertaken to make. The rails were made, but not delivered, for the reason of the ordering of Company A to be wound up. It was held that the order was binding on Company A, although the managing director of Company B might have known the purpose for which the rails were to be

used. *In re Contract Corp.*, L. R. 8, Eq. 14.

¹ *Corn Exchange Bank v. Cumberland Coal Co.*, *supra*. If no illegality is shown as against the party with whom the directors contract under the seal of the company, excess of authority is a matter only between the directors and the shareholders. *Royal British Bank v. Turquand*, 32 Eng. L. & Eq. 273; *aff'd* 36 Ib. 142. Where it appears, from the certificate of the officer taking the acknowledgment of an agreement to submit matters in difference to arbitration, that the agreement was executed and acknowledged by an agent appointed for that purpose, it will be presumed that such agent was duly authorized; and if the other party make no objection, he will be deemed to have acquiesced in the appointment. *Detroit v. Jackson*, 1 Doug. Mich. 106. Estoppels *in pais* operate both for and against corporations; and it may be laid down generally that a party will be concluded from denying his own acts or admissions which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter. *Selma & Tennessee R.R.*

In the absence of evidence to the contrary, it may be presumed that a trading corporation, which has power to make, accept, and indorse bills of exchange, has by its votes or by-laws intrusted the exercise of this power to some officer or agent. If a person acts as treasurer, and is so held out without protest by the company, it will be presumed that he was duly elected and qualified from the fact of his openly acting as such.¹ Where, therefore, it appeared that a manufacturing corporation had gone into operation, and that one of their number had held himself out as treasurer and acted as such, it was held competent for the jury to presume, and that in the absence of all rebutting proof it would be their duty to find, that such person had been chosen treasurer, and as such had authority to accept a bill of exchange in behalf of the corporation.² Officers of a corporation having been expressly authorized to issue stock in exchange for certain indebtedness of the company, and done it for a long time, they also issued stock for indebtedness not included in the express authority. Their acts

Co. v. Tipton, 5 Ala. 787. "In cases where the authority of an agent has been wholly withdrawn, the neglect of the duty to notify parties who have dealt with him, estops the principal from denying the continuance of the agency, although no power in fact exists. And so a retiring partner is bound by the acts of his former firm if he omit the duty of notice. In these cases, for omitting an act which would have prevented the injury, the truth, to wit, the actual want of authority, is shut out by the negligence; but the neglect does not cause the assumed agent to do the act which occasions the injury; it only suffers an opportunity to do it to exist, which in law is equivalent." DAVIS, J., in N. Y. & New Haven R.R. Co. v. Schuyler, 34 N. Y. 30. The authority of a person, other

than the grantor himself, to execute and deliver a deed, must of necessity be made out of proof *aliunde*, and a recital in the deed itself does not dispense with the necessity. Watson v. Watson, 10 Conn. 77; Howard v. Lee, 25 Id. 1. It is sufficient, so far as the instrument is concerned, that it is in the name of a company, with its corporate name and seal affixed by the president. The question whether the latter had authority in fact to do what he did, is necessarily one to be inquired into *aliunde*. Hart v. Stone, 30 Id. 94.

¹ Hoyt v. Shelden, 3 Bosw. 267, per WOODRUFF, J.; S. C. 3 Sandf. 416; 1 Seld. 355.

² Lester v. Webb, 1 Allen, 34; Fay v. Noble, 12 Cush. 1; Williams v. Cheney, 3 Gray, 215; Conover v. Mu, Ins. Co., 1 Comst. 290.

in relation to the latter, which had never been called in question by the corporation, were held binding upon the corporation and upon creditors accepting such stock.¹ Where the president of a corporation is in the habit of acting as its business agent, with its knowledge and without objection, making sales, settling accounts, and collecting debts, actual authority may be presumed. A person in debt to a corporation having given a due-bill for the amount, which went to the corporation in full settlement and satisfaction, payable to the president or order, it was held binding on the corporation.² The president of an insurance company, in communicating instructions to an agent authorizing him to receive premiums and agree to make insurances, was considered as acting by the authority of the corporation until the contrary was shown.³ So a written power, signed by the president of an insurance company, authorizing the attorney of a bank to take necessary steps to obtain an order for a resale of mortgaged premises to protect the interest of the bank in such property, was deemed sufficient to authorize the attorney to present a petition, enter an appeal, and employ counsel for the corporation; and it was held that if the president exceeded his authority in giving such power, the corporation should look to him for any damage it might have sustained thereby.⁴ A railroad company caused an advertisement, signed by the secretary of the company, offering for sale a quantity of old iron rails. R., who was acting for an iron broker, called on the secretary in relation to the iron, inquired the price, informed the secretary for whom he, R., was acting, and was referred to the president of the company, who, upon being told that the broker would charge one per cent. commission on the sale of the iron, assented thereto. The

¹ Narragansett Bank v. Atlantic Silk Co., 3 Metc. 282.

² Lohman v. N. Y. & Erie R.R. Co., 2 Sandf. 39.

³ Dougherty v. Hunter, 54 Pa. St. 380. See Brown v. Donnell, 49 Me. 421.

⁴ Perkins v. Washington Ins. Co., 4 Cow. 645.

broker thereupon had an interview with the president, disclosed to him the party wishing to buy the iron, and informed him that he, the broker, would charge one per cent. commission. A sale having been subsequently effected by the broker, and an action brought by him for his commissions, it was held that the facts and circumstances afforded evidence from which the jury might find that the acting president was authorized to make the contract sued on.¹ The *bona fide* holder of a promissory note, negotiated before maturity for full value in the usual course of business, is not chargeable with notice that the president of an insurance company, by its by-laws, is not authorized to indorse its notes.²

All loans and discounts made by the officers of a bank from its corporate funds must be presumed to have been made by the authority of the directors, unless they show that the funds of the bank constituting such loans have been improperly appropriated contrary to the instructions of the board of directors, or without authority.³ The cashier or treasurer of a corporation is usually intrusted with the notes, securities, and other funds, and held out to the world as its general agent in the negotiation, management, and disposal of them. He need not, therefore, have any special authority to transfer and indorse negotiable securities held by the corporation. When a corporation departs from this general course of business, it is incumbent on it to show that it has restricted its general fiscal agent in this respect, and that such restriction is known to those in the habit of dealing with the bank.⁴ In the absence of express

¹ Am. Ins. Co. v. Oakley, 9 Paige Ch. 496.

² Merchants' Bank v. McColl, 6 Bosw. 473; Nichols v. Frothingham, 45 Me. 220.

³ Bank Commrs. v. Bank of Buffalo, 6 Paige Ch. 497.

⁴ Wild v. Bank of Passamaquoddy, 3

Mason, 505; State v. Commercial Bank, 6 Smed. & Marsh, 218; Stark Bank v. U. S. Pottery Co., 34 Vt. 144; Lester v. Webb, 1 Allen, 34. The *ex officio* authority of a cashier to bind the bank is only such as he is held out to the public to possess according to the general usage, practice, and course of bus-

provisions in the charter of a mutual insurance company, limiting the appointment of officers and agents, or the scope of their powers and duties, it must be presumed that each person, in becoming a member of the company, impliedly consents that it shall be represented by such officers and agents as are reasonably necessary for the transaction of its business, and that they shall possess the powers and perform the duties ordinarily possessed and performed by such officers and agents.¹

§ 105. **Security for good behavior.**—Where the statute directs that a corporation shall take a bond, without prescribing its form, it may be taken in the name of the individual members. A formal vote is not necessary to prove either the acceptance or approval by the directors of a bank of the cashier's bond; but both may be presumed from circumstances.² Parol evidence was held admissible that soon after the cashier was appointed, he presented his bond, which was laid before the board of directors at their meeting, and that they expressed themselves satisfied.³ SHAW, C. J., remarked that there was a distinction between an act which would amount to an acceptance of the bond on the part of the corporation, and the approval of it by the directors; that if the bond was executed and delivered in the mode required by law to give it effect, it might be deemed the deed of the principal and sureties, although it was never approved by the directors; that the directors might be chargeable with neglect of duty to the stockholders, in not being more vigilant in obtaining a satisfactory bond, and in complying with the by-laws in that regard, and yet the

ness of such institutions, and his acts within the scope of such usage, practice, and course of business, bind the bank in favor of third persons who have no knowledge to the contrary. Story on Agency, sec. 114.

¹ Protection Life Ins. Co. v. Foote, 79 Ill. 361.

² Dedham Bank v. Chickering, 3 Pick. 335; Bank of U. S. v. Dandridge, 12 Wheat. 64.

³ Amherst Bank v. Root, 2 Metc. 522.

parties to the obligation not be allowed to avail themselves of that objection to avoid their obligation.

A cashier's bond is not void as against the policy of the law, because three of the board of directors, whose duty it was to examine and approve his bond, were themselves his sureties.¹ A cashier's bond is not void because he neglected to be sworn according to law before he entered on the duties of his office.²

The condition of an official bond, that the obligor shall well and faithfully perform his duties, has reference to his honesty, and not to his ability.³ Such a bond binds him to a responsibility for reasonable and competent skill, and due and ordinary diligence in the performance of his office; and an allegation that he has received moneys for which he has not accounted, is a sufficient assignment of a breach of the bond.⁴ Where the bond of the cashier of a bank contained a condition that "said H. should well and truly perform all the duties of his office according to law and the by-laws of the institution during the term of his continuance in office; and that he should also carefully preserve all money, books, papers, etc., belonging to said bank, and not at any time, directly or indirectly, make known in any way to any person or persons, except the president and directors of said bank, any secrets, or other words that might discover the situation or state of the funds or credits of the said bank," it was held that although this condition was not in the precise language employed in the act, yet that the vari-

¹ Ibid. SHAW, C. J.: "This exception certainly comes with a very bad grace from those directors who thus became sureties. It sets up the dereliction of their duty as directors, to avoid their obligation as contractors. It may have been in very bad taste, it may have been very indiscreet and ill-judged, to put themselves in a situation to express an opinion on their own

sufficiency as sureties. But, whether right or wrong, it is impossible to perceive how the obligors, either such directors themselves, or their co-obligors, can avail themselves of this circumstance to avoid their obligation."

² State Bank v. Chetwood, 3 Halst. 1.

³ Union Bank v. Clossey, 10 Johns. 271; S. C. 11 Ib. 182.

⁴ Am. Bank v. Adams, 12 Pick. 303.

ance was not such as to invalidate the bond.¹ The condition of a bond given by a treasurer of a manufacturing company was, that he should faithfully discharge his duties for the term during which he had been elected, and for and during such further time as he might continue therein by re-election or otherwise. It was held that the words applied to a continuous holding of the office, and did not embrace a case of resumption of the office after having ceased to hold it, and after another person had discharged its duties upon an election and qualification therefor by giving an official bond.² So, where the treasurer of a railroad company enters into a bond to secure the faithful discharge of the duties of the office while he continues therein, "during the present year, and for such further periods as he may from time to time be elected to said office," it is implied that the elections are to be continuous, and that at the expiration of each year the bond only extends to a reasonable time beyond the year sufficient to elect and qualify a new treasurer, although he continues to act as treasurer after a failure to re-elect him at a regular meeting, and he is re-elected at the next regular meeting thereafter.³ But it was held that a bond given by a treasurer of a manufacturing company, although in general terms, and with the condition that "if, during his continuance in office, he shall faithfully perform," etc., did not bind the sureties beyond the period of his first election and the qualification of his successor, the office being by statute an annual one; that his re-election from time to time did not charge the sureties, and that the provision of the statute that the treasurer, when elected, "shall hold his office until another is chosen and qualified in his stead," did not extend the liability to sub-

¹ *Bank of Carlisle v. Hopkins*, 1 T. B. Mon. 245.

² *Middlesex Manf. Co. v. Lawrence*, 1 Allen, 339.

³ *Lexington, etc., R.R. Co. v. Elwell*, 8 Allen, 371; *Frankfort Bank v. Johnson*, 23 Me. 322. See *Bruce v. U. S.*, 17 How. 437.

sequent elections of the same person.¹ In the year 1855, S. was elected treasurer of an association to fill a vacancy, and gave his bond for the faithful discharge of his duties. On this bond judgment was entered in pursuance of a warrant of attorney. The office was annual, and S. was re-elected annually until the year 1860, but never gave another bond. He was in no default until 1860, when he died indebted to the association as treasurer, which indebtedness the association claimed was a lien under the judgment upon his real estate. It was held that the condition of the bond was to be confined to the period of appointment or election for which the bond was given, and that the judgment stood as security for the liability of S., incurred during such period.² The objection that the capital of a bank having been enlarged by statute, and a corresponding enlargement of the duties of cashier created, the bond previously given by him was not binding, was held not tenable, the sphere of his duties being the same, although the subject matter of his charge had been increased, which was no more than what happened from day to day from fluctuations in the amount of deposits.³

¹ Chelmsford Co. v. Demarest, 7 Gray, 1.

² Manufacturers', etc., Loan Co. v. Odd Fellows' Hall Assoc., 48 Pa. St. 446, referring to Lord Arlington v. Merrick, 2 Saund. 411; Liverpool Waterworks v. Atkinson, 6 East. 507; Barker v. Parker, 1 Taunt. 295; Peppin v. Cooper, 2 B. & A. 431; Com. v. Boynton, 4 Dall. 282; Com. v. West, 1 Rawle, 31; Com. v. Reitzell, 9 Watts & Serg. 109. In an early case in New Hampshire, the court, per RICHARDSON, C. J., laid down the following as the correct rule of law: "When the term of office is limited to a particular period, as a year, or five years, and the person appointed cannot continue in office for a longer period without a new

appointment, then the official bond, if nothing appear to the contrary, is presumed to be intended to be confined to the particular term; and if the officer be reappointed, there must be a new bond. But when an office is held at the will of those who make the appointment, and is not limited to any certain term, then the bond is presumed to be intended, if nothing appear to the contrary, to cover all the time the person appointed shall continue in office under the appointment." Exeter Bank v. Rogers, 7 N. H. 21.

³ Bank of Wilmington, etc., v. Wolleston, 3 Har. Del. 90. An entry in the books of the corporation of a resolution of certain directors, not a sufficient number to constitute a board, that the

§ 106. **Liability of sureties on official bond.**—The liability of a surety can only attach whilst the agent is employed in the discharge of duties which the charter gives the corporate body the right to impose.¹ When the treasurer of a corporation is required to be elected annually, and to hold his office until another treasurer is chosen and qualified, the law will presume that the sureties on his bond bind themselves accordingly, unless words are inserted in the bond clearly indicating the contrary.² If the corporation fail to elect a treasurer annually, or do not require him to give a bond within a reasonable time after he has signified his acceptance of his election, and especially if it permits him to serve not only during that year, but for succeeding years, without giving a bond, such a course cannot enlarge or vary the rights and liabilities of his sureties, who have become responsible for his conduct in discharging the duties of an annual office.³ The bond given by a cashier provided that he should account for all notes, drafts, and money which had come into his possession prior as well as subsequent to the date of the bond. It was held that, although

name of one of the obligors in the cashier's official bond be stricken out, provided the others consented thereto, does not show that the other obligors consented to the alteration of the bond; but that the bank was then in possession of the bond without alteration. *Barrington v. Bank of Washington*, 14 Serg. & Rawle, 405. M., having been appointed an agent of an unincorporated joint stock company, gave to the directors of the company for the time being his bond, with sureties for the faithful discharge of his duties. It was held that the obligees might maintain an action for a breach of the condition of the bond occurring after they ceased to be directors. *Anderson v. Longden*, 1 Wheat. 85. An act or vote of the board of directors, in violation of their

duties and in fraud of the rights and interests of the stockholders of a bank, will justify the cashier in violating his official bond well and truly to execute the duties of his office. *Minor v. Mechanics' Bank*, 1 Pet. 46.

¹ *Blair v. Perpetual Ins. Co.*, 10 Mo. 559. An increase of the capital stock of the corporation will discharge the sureties on the cashier's bond. *Grocers' Bank v. Kingman*, 16 Gray, 473. But if the position and nature of the duties remain the same, and the only change is that the duties and compensation are increased in amount, such increase is within the bond. *Eastern R.R. Co. v. Loring*, 138 Mass. 381.

² *Hassell v. Long*, 2 M. & S. 363.

³ *Chelmsford Co. v. Demarest*, 7 Gray, 1.

the agents of the bank knew when the bond was given, that bonds of preceding years had not been taken, or could not be found, they were not bound to communicate the fact to the sureties, unless they also knew there was a deficiency or defalcation on the part of the cashier; that the condition of the bond did not extend to the keeping of the books of the bank, or the cashier's neglect or omission in that respect at any time prior to its date, and that the directors and agents of the bank were not bound to communicate the information they had on the subject; and that the misconduct of the directors previous to the date of the bond, though it might render them liable to the stockholders, was no defense to a suit on the bond.¹ A person entered into a bond with sureties to the Bank of the United States for the faithful performance of the duties of cashier of the office of discount and deposit of the bank at Middletown, Connecticut, for and during the term he should hold the office of cashier. The bank, learning that he had embezzled its funds, on the 27th of October adopted a resolution suspending him from office until the further pleasure of the board, and the president of the office at Middletown was authorized and requested to receive into his custody from the cashier "the cash, bills discounted, books, papers, and other property in said office, and to take such measures for having the duties of cashier temporarily discharged, as he may deem expedient." This resolution was received by mail by the president of the office at Middletown, Sunday morning, October 29th, but not communicated to the cashier until the afternoon of the 30th. It was held that the suspension did not take effect until the cashier was notified of it, and that the sureties on his bond continued liable to that time, though, if the resolution had been one of removal, instead of suspension from office, the sureties would have been discharged from the time of its passage.²

¹ Franklin Bank v. Stevens, 39 Me. 532.

² Bank of U. S. v. Magill, 1 Paine C. C. 561, aff'd 12 Wheat. 511.

Previous to the reappointment of a cashier of a bank, he had appropriated money of the bank to his own use, and subsequently, before an investigation into the condition of the bank by the directors, he borrowed funds, which he deposited in the bank, thus concealing his defalcations, and, after such investigation, drew out the money he had borrowed, and returned it. It was held a breach of the condition of the bond given by the cashier with surety for his good behavior.¹ The defendant entered into a bond as surety for the faithful performance by C. of his duty as clerk to a bank. C., having been sent by the manager of the bank, at the request of a customer, to his residence, several miles distant from the bank, in order to receive a large sum of money, to be placed to the customer's account, on his way back lost it. It was held that the money was received by C. in the course of his employment as clerk to the bank; that the defendant was liable as surety, notwithstanding the finding of the jury that it was not the custom for bankers in that part of the country to send for their customers' money in the manner adopted, and that the loss of the money was *prima facie* evidence of gross negligence on the part of C.² Where two railroad companies were amalgamated by an act of Parliament, which provided that all the securities of the old company were to be vested in the new, it was held that a surety on a bond entered into to one of the companies before amalgamation, was liable for breaches committed afterward.³ The sureties are not discharged in consequence of the adoption of a by-law

¹ Ingraham v. Marine Bank, 13 Mass. 207.

² Melville v. Dodge, 6 M. G. & S. 450.

³ Eastern Union R.R. Co. v. Cochran, 17 Jur. 1103; 23 L. J. N. S. Exch. 61; 24 Eng. L. & Eq. 495; S.P. London & Brighton R.R. Co. v. Goodwin, 3 Exch. 320. The sureties on the

bond of the treasurer of a railroad company are chargeable with the sums indorsed as interest paid upon the notes of the treasurer running to the company, the indorsements thus made furnishing sufficient evidence to create such liability without further proof of actual payments of money. Lexington, etc., R.R. Co. v. Elwell, 8 Allen, 371.

changing the time for holding the annual meeting, nor by reason of a change in the mode of conducting the business of the corporation after the termination of a lease of its property.¹

§ 107. **Release of surety.**—A change in the contract in any material part, without the consent of the surety, will discharge him from his obligation.² In January, 1851, the defendant and others severally entered into a bond to a railroad company, the condition of which was that the company having agreed to appoint L. as its coal agent, to sell coal for the company, at a salary of £100 per year, upon his finding sureties for his duly accounting, and his honest conduct during the time of his continuance in such coal agency; if L. should from time to time and at all times duly account and pay over the moneys received, the obligation was to be void: provided that each of the sureties should be liable for only £50, and should be at liberty to put an end to his liability on the bond on giving the railroad company six months' written notice. L. thereupon entered upon his duties as coal agent, and continued in the same at the above-mentioned salary until May, 1851, when it was agreed between him and the company that instead of the salary he should be paid a commission of 6d. per ton on all the coal for which he could get orders. L. subsequently discharged the same duties as before until the fall of 1852, receiving therefor the commission, which amounted to more than the salary. The defendant never gave any notice to determine his liability. L. failed to pay over to the company certain money received, and an action was brought by the company against the defendant as surety. It was held that the alteration in the mode of remunerating L. changed the relation between him and the

¹ Lexington, etc., R.R. Co. v. Elwell, U. S. v. Tillotson, 1 Paine C. C. 305; 8 Allen, 371. Commissioners v. Ross, 3 Binn. 520;

² Miller v. Stewart, 9 Wheat. 680; U. S. v. Hillegas, 3 Wash. C. C. 70.

company, and released the defendant from liability.¹ Where the charter of a bank was extended without taking any new security from the cashier, it was held that his sureties could not be charged with any defalcation which took place after the expiration of the charter.²

In contracts of suretyship, if there be any misrepresentation or concealment in relation to any material part of the transaction to induce the surety to enter into the obligation, the contract will be void. Thus, if a principal, knowing that he had been cheated by an agent, should apply for security for the good conduct of the agent, and conceal such fact, and any one in ignorance of the same should become surety for the agent, the obligation would be void.³ It is sometimes difficult to determine what will constitute a material part of a transaction in relation to which misrepresentation or concealment will be deemed fraudulent. Of course, to be thus material, it must be some fact or circumstance immediately affecting the liability of the surety, and bearing directly upon the particular transaction to which the suretyship attaches.⁴ There is no exception to the rule that mere forbearance by the creditor to the principal debtor will not discharge the surety, in the case of the sureties of an officer charged with the receipt and disbursement of money; and it is not the duty of the corporation to dismiss the officer as soon as any default becomes known, and to give notice to his sureties, in order that they may take measures to secure themselves by proceeding against the principal.⁵ In an action against the surety on a bond conditioned for the faithful discharge of the duties of a relieving officer, the defendant proved that when the bond was executed there was a balance of £206 due from

¹ *Northwestern R.R. Co. v. Winray*, 26 Eng. L. & Eq. 488. *Me.* 532; *Same v. Bank of Cooper*, *Ib.* 542; *S. C.* 36 *Me.* 179.

² *Thompson v. Young*, 2 *Ohio*, 334.

³ *Maltby's Case*, 1 *Dow*, 294.

⁴ See *Franklin Bank v. Stevens*, 39

⁵ *Pittsburg, etc., R.R. Co. v. Shaeffer*, 59 *Pa. St.* 350.

the principal in respect to money which had been received by him. It was held that as the existence of that balance did not necessarily involve any imputation of misconduct on the part of the relieving officer, it was not a material fact, and that the non-communication of it to the surety did not release him.¹

§ 108. *Officers de facto*.—The acts of officers *de facto* are binding on the corporation, and it need not be shown that they were regularly elected.² A corporation which has permitted certain persons to take charge of its property, seal, and records, and to act as its trustees, thereby holding them out to the public as such, is estopped from questioning what has been done by them within the scope of their apparent authority.³ The principle underlying the recognition of officers *de facto* and supporting the validity of their official acts is, that although they are wrongfully in office exercising power legally appertaining to the rightful officers, yet their acts within the scope of official authority and duty must, for the protection and preservation of the rights and interests of third persons, be sustained.⁴ Notwithstanding the president and managers of a Pennsylvania corporation, at the time of entering into a contract, were not residents or citizens of the State, it was held sufficient for the purpose of upholding the contract that they were officers *de facto*, or that the acts of the parties under the agreement amounted to evidence of ratification.⁵ Where a bank di-

¹ Guardians of Stokely Union v. Strother, 22 L. T. 84; 24 Eng. L. & Eq. 183.

² Cahill v. Kalamazoo Mu. Ins. Co., 2 Dougl. Mich. 124. In Woodeson's Lectures, 491, it is laid down that if an officer *de facto* perform a corporate or judicial act, as if a mayor seal a bond, or a sheriff discharge an official duty, his proceedings are valid, although he is not *de jure* qualified for his station. There must, however, have been an

election, however irregular, otherwise he is a mere usurper. Being sworn in and acting, do not, without an election, constitute an officer *de facto*. See Rex v. Lisle, 2 Strange, 1090; McCall v. Byram Manf. Co., 6 Conn. 428.

³ Lovett v. German-Reformed Church, 12 Barb. 67.

⁴ Thorington v. Gould, 59 Ala. 461.

⁵ Del. & Hudson Canal Co. v. Pa. Coal Co., 21 Pa. St. 131. See Bank of St. Mary's v. St. John, 25 Ala. 566;

rector was not properly elected, but came into the direction under color of right, it was held that being an officer *de facto*, his acts were binding on the bank.¹ By electing a person a director and permitting him to act as such, the corporation holds him out to the world as one of its agents, having all of the powers of an agent of that description and to be trusted as such. It is only necessary under such circumstances for those who deal with the corporation through him to inquire what powers directors have and what acts the corporation has authorized them to do. They are not required to investigate the qualifications which the corporation may have prescribed to itself as the condition upon which any one shall be elected or permitted to act.² A person who effects an insurance on his life in the ordinary course of business, need not inquire whether the individuals signing the policy as directors have been legally appointed such, or are authorized to affix the seal of the company. It is sufficient that the policy on its face is consistent with the articles of association and the charter. By the articles of association of an insurance company A. was appointed managing director. The other directors who were named in the articles and signed the memorandum of association refused to act, and adopted a resolution that the company should not carry on business or allot shares. A. and one of the stockholders notwithstanding carried on the business at the office of the company, allotted shares, and appointed directors. A stranger effected a policy at the company's office, signed by three of the *de facto* directors, and sealed with what purported to be the company's seal. It was held that the company was liable on the policy.³ It has been said that

Walker v. Flemming, 70 N. C. 483; Cal. 179; Lebanon, etc., Gravel R. Co. Hackensack Water Co. v. De Kay, 36 N. J. Eq. (9 Stewart) 548. v. Adair, 85 Ind. 244.

² Dispatch Line of Packets v. Bellamy Manuf. Co., 12 N. H. 205.

¹ Baird v. Bank of Washington, 11 Serg. & Rawle, 411. See San Jose Savings Bank v. Sierra Lumber Co., 63

³ *In re* County Life Assoc. Co., L. R. 5, Ch. 288.

the law is well settled in England, New York, Massachusetts, and Pennsylvania, that the act of an officer who is only such *de facto* is not valid when it is done for his own benefit; but that it is otherwise if he acts for the benefit of strangers, or of the public who know nothing about his title to the office.¹ Where parties acting as trustees of a religious corporation brought a suit *colore officii*, it was held that the defendant could not sustain an objection to their right of recovery on the ground that they were not trustees, without showing that they had been removed.²

§ 109. Ratification of unauthorized acts. — The familiar rule that a subsequent ratification is tantamount to an original authority was somewhat considered in a previous chapter.³ It has been truly said that “the maxim which makes ratification equivalent to a precedent authority is as much predicable of ratification by a corporation as it is of ratification by any other principal, and it is equally to be presumed from the absence of dissent.”⁴ Ratification operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. From this it follows that a ratification can only be made when the party ratifying himself possesses the power to perform the act ratified.⁵

¹ Riddle v. Bedford County, 7 Serg. & Rawle, 386; Keyser v. McKissam, 2 Rawle, 139; McGargell v. Hazleton Coal Co., 4 Watts & Serg. 424; Kingsbury v. Ledyard, 2 Id. 37.

² Vernon Soc. v. Hills, 6 Cowen, 23; All Saints' Church v. Lovett, 1 Hall, 191; Smith v. Erb, 4 Gill, 437.

³ *Ante*, ch. 7, sec. 98. When stockholders have full knowledge of all of the facts, they may ratify a contract, although ignorant of the legal effect of the facts. Kelley v. Newburyport Horse R.R. Co., 141 Mass. 496.

⁴ Gordon v. Preston, 1 Watts, 386, per GIBSON, C. J.; S. P. Kelsey v. Nat. Bank, 69 Pa. St. 426; Woman's Christian, etc., Union v. Taylor, 8 Col. 75; Fifth Ward Savings Bank v. First Nat. Bank, 7 Atlantic Rep. 318.

⁵ Marsh v. Fulton Co., 10 Wall. 676; Crum's Appeal, 66 Pa. St. 474; First Nat. Bank v. Fricke, 75 Mo. 178; Scott v. Middletown, etc., R.R. Co., 86 N. Y. 200. See Planters' Bank v. Sharp, 4 Smed. & Marsh, 75; Medomak Bank v. Curtis, 24 Me. 36; U. S. Rolling Stock Co. v. Atlantic, etc., R.R. Co.,

A corporation may do acts which affect the public injuriously, because they are *per se* illegal or are *malum prohibitum*, in which case no assent of the stockholders will render the acts valid. In *Barton v. Plank R. Co.*,¹ it was said by the court: "I have yet to find a case where the directors or even the stockholders of a corporation may waive the provisions of a prohibitory statute enacted for good reasons expressly forbidding the directors of a company from participating in the benefits of a contract for building their road." A contract which is prohibited by law is in the same condition as if no contract had been made, and therefore a ratification of it is not possible.² But a proceeding which is within the possible and potential powers of a corporation, though outside the powers of a majority not amounting to the entire body of corporators, may be ratified or acquiesced in, and thereby be rendered binding.³ Acts of the officers of a corporation are frequently said to be *ultra vires* when they are wholly within the scope of the franchise granted in the charter, but beyond the authority conferred upon the officers. Such acts, though directly contrary to the provisions of the charter, if authorized by the shareholders or acquiesced in or confirmed by them,

34 Ohio St. 450; *Hayden v. Middlesex Turnp. Corp.*, 10 Mass. 397; *Board of Commrs. of Tippecanoe Co. v. Lafayette, etc.*, R.R. Co., 50 Ind. 85; *Martin v. Zellerbach*, 38 Cal. 310; *Hazard v. Durant*, 11 R. I. 196; *First Nat. Bank v. Drake*, 29 Kansas, 311; *Pacific R.R. Co. v. Thomas*, 19 Id. 256; *Sherman v. Fitch*, 98 Mass. 59; *Boston & Providence R.R. Co. v. N. Y. & New England R.R. Co.*, 13 R. I. 260; *Murray v. Nelson Lumber Co.*, 9 *North-eastern Reporter*, 634; *Kichland v. Menasha Woodenware Co.*, 31 *North-western Reporter*, 471.

¹ 17 Barb. 397, per ALLEN, J.

² *Taymouth v. Koehler*, 35 Mich. 22;

Martin v. Zellerbach, 38 Cal. 300; *Alexander v. Cauldwell*, 83 N. Y. 480; *Davis v. Old Colony R.R. Co.*, 131 Mass. 258.

³ *Phosphate of Lime Co. v. Green*, L. R. 7, C. P. 43; *International R.R. Co. v. Bremond*, 53 Texas, 96; *Bedford R.R. Co. v. Bowser*, 48 Pa. St. 29; *Memphis Branch R.R. Co. v. Sullivan*, 57 Ga. 240; *Martin v. Pensacola, etc.*, R.R. Co., 8 Fla. 370; *Empire Transfer Co. v. Blanchard*, 31 Ohio St. 650; *Hotel Co. v. Wade*, 97 U.S. 13; *Pneumatic Gas Co. v. Berry*, 113 Id. 322; *Evans v. Smallcombe*, L. R. 3, House of Lords. 249. See *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587.

cannot be avoided after third persons have acted upon them. They are regulated by the rules which govern the relation of principal and agent to third persons.¹

There need not be express assent on the part of the stockholders to work an equitable estoppel upon them. When they neglect to promptly and actively condemn the unauthorized act, and to seek judicial redress after knowledge of the committal of it, this will be deemed an acquiescence in it, and if innocent third persons have been thereby led to put themselves in a position from which they cannot be taken without loss if the act were held invalid, the stockholders will be estopped from questioning it.² In a case decided by the New York Court of Appeals in 1879, in which these principles were discussed, FOLGER, J., said: "When the public is concerned to restrain a corporation within the limit of the power given to it by its charter, an assent by the stockholders to the use of unauthorized power by the corporate body will be of no avail. When it is a question of a right of a stockholder to restrain the corporate body within its express or incidental powers, the stockholder may in many cases be denied relief on the ground of his express assent, or his intelligent though tacit consent to the corporate action. If there be a departure from statutory direction which is to be considered merely a breach of trust to be restrained by a stockholder, it is pertinent to consider what has been his conduct in regard thereto."³

If a person be employed for a corporation by one assuming to act in its behalf, and renders services according to the agreement with the knowledge of its officers, and such person has no notice that the contract is not recognized as valid and binding, the corporation will be held to have rati-

¹ Hazlehurst v. Savannah, etc., R.R. Co., 43 Ga. 53. meyer Hat Blocking Machine Co., 90 N. Y. 607.

² Leavitt v. Yates, 4 Edw. Ch. 134; ³ Kent v. Quicksilver Mining Co., 78 Sheldon Hat Blocking Co. v. Eick- N. Y. 159.

fied the contract, and be compelled to pay for the services pursuant to the agreement. Having availed itself of the work and received the benefit, it will not be heard to say that the agreement was not made by a person legally authorized to contract. If, however, the contract is still executory and nothing has been done under it, and the action is to recover damages for non-performance, it is incumbent on the plaintiff to show a legal contract binding on the corporation.¹ By the act incorporating a company it was authorized to purchase and hold such real and personal property as might be necessary to enable the company to carry on its operations. A resolution was passed vesting N., the president, with discretionary power as to "all matters ap-

¹ *Fister v. La Rue*, 15 Barb. 323. The plaintiff, to save a corporation from a lawsuit, at the request of its president and superintendent, paid certain outstanding notes, and delivered them to its secretary, who wrote across the face of them, "Paid in full," and then filed them with the papers and vouchers of the corporation. To secure the plaintiff for the money thus advanced two promissory notes were executed and delivered to him by the secretary in the name of the corporation. These last-named notes were not expressly authorized, but they were afterward sanctioned by the board of directors, and by the stockholders at their annual meeting. It was held that the transaction was equivalent to a loan, and that the corporation was liable, although the enforcement of the original notes against it might have been questionable. *Seeley v. San Jose Lumber Co.*, 59 Cal. 22. Acts of a subsequent board of directors were held to constitute a ratification of a mortgage given by a previous board. *Hoyt v. Bridgewater Copper Mining Co.*, 2 Halst. Ch. 253. Where it is provided in a policy of insurance issued

upon a factory that if coal oil shall be used for lighting the premises the policy shall be void, and the company at the time the policy is issued and premium accepted know that the factory is to be operated at night and lighted with kerosene oil, the condition will thereby be waived; and the knowledge of the agent will be knowledge of the company. *Couch v. Rochester German Fire Ins. Co.*, 25 Hun, 469. Payment by a corporation of a royalty on articles manufactured under a patent, which royalty certain persons who afterward organized under the corporation had agreed to pay, is a ratification of the contract by the corporation. *Bonner v. Am. Spiral & Hinge Manf. Co.*, 81 N. Y. 468. If contracts have been made openly with the knowledge of the incorporators, the public have a right to presume that they are within the scope of the authority granted. *Allegheny v. Clurkan*, 14 Pa. St. 81. Contracts, however, based on acts of agents not within the powers conferred on a corporation by its charter being void, cannot of course be rendered valid by subsequent ratification. *McCullough v. Moss*, 5 Denio, 577.

pertaining to the projects of the company," and he proceeded to make such contracts in behalf of the company as he deemed necessary. He purchased a house to be used by the company for an office, and a boarding-house for the laborers of the company, agreeing to pay therefor three thousand dollars, five hundred dollars of which he paid down, and gave a mortgage in the name and under the seal of the company for the balance. N., as the agent of the company, entered into possession immediately after the purchase; the trustees held their meetings in the house, and nothing was said as to N.'s want of authority until six weeks afterward, when, at a meeting held on the premises, a resolution approving the contract was offered and rejected. It was held that the authority of N. to make the contract as agent of the company sufficiently appeared, and that if this were doubtful, the acts of the company amounted to a ratification.¹ The board of managers of a railroad

¹ *Shaver v. Bear River Mining Co.*, 10 Cal. 396. The recognized and known functionaries, and especially the officers of a bank, are held out to the world as having authority to act according to the general usage, practice, and course of business of such institutions. Their acts, therefore, within the scope of such usage, practice, and course of business, will bind the corporation in favor of third persons transacting business with them and who do not know at the time that the officers are acting beyond the scope of their authority. *Lloyd v. West Branch Bank*, 15 Pa. St. 172; *Durar v. Ins. Co.*, 4 Zab. 171; *Emmet v. Reed*, 8 N. Y. (4 Seld.) 312; *Minor v. Mechanics' Bank*, 1 Pet. 46. "If the managers faithfully perform their duty, they exercise a constant and vigilant supervision over the acts of their officers, and where such acts are unauthorized, or in opposition to their will, they should, and probably

do, direct their discontinuance, and, in case of wilful and palpable violation of duty, dismiss the agent. If the directors of a company, no matter whether through inattention or otherwise, suffer its subordinate officers to pursue a particular line of conduct for a considerable period without objection, they are as much bound to those who are not aware of want of authority as if the requisite power had been directly conferred." *STRONG, J.*, in *Beers v. Phoenix Glass Co.*, 14 Barb. 360. In an action against a bank for legal services rendered in its behalf at the instance of the president of the bank, the plaintiff need not show that the legal proceedings were authorized by the board of directors; the institution or recognition of such proceedings by the officers having charge of the financial concerns of the bank being sufficient. The bank will not be permitted to show that the board of directors disapproved of the

company relinquished to the president, for a period of three years, the exclusive management of the business of the company, allowing him in his discretion to employ and pay the workmen, to purchase iron for the track and cause it to be laid down, to borrow money, giving the notes and other securities of the company therefor, to purchase locomotives and cars and to pay for them in like securities; and when at the end of three years the managers again resumed the discharge of their appropriate duties, they took possession of the road and of all the property thus procured by the president, and continued to use it for several years without questioning the manner in which it had been obtained. It was held that the acts of the president were binding on the company, the silent acquiescence of the managers being as effectual to clothe the president with power as an express letter of attorney.¹

It is a well-settled principle that if a corporation has enjoyed the benefit of an act done in its behalf, assent of the corporation thereto will be presumed.² "When a person

proceedings after the services were rendered. *Mumford v. Hawkins*, 5 Denio, 355.

¹ *Olcott v. Tioga R.R. Co.*, 27 N. Y. 546. An act provided that any railroad company might at any time, by means of subscription to the capital stock of any other company or otherwise, aid such company in the construction of its road for the purpose of forming a connection of said last mentioned road with the road owned by the company furnishing such aid, and that any two or more railroads, the lines of which were connected, might enter into any arrangement for their common benefit. A company having, pursuant to such an arrangement, guaranteed the payment of the interest coupons issued by another company, it was held in an action against the guar-

antors that, as between third parties without notice and such guarantors, it need not be shown that the acts of the latter were authorized or ratified by the company, the provisions of the act being intended for the protection of the shareholders. *Conn. Mu. Life Ins. Co. v. Cleveland, etc.*, R.R. Co., 41 Barb. 9.

² *Merchants' Bank of Macon v. Central Bank of Ga.*, 1 Kelly Ga. 418; *Owen v. Purdy*, 12 Ohio St. 73; *Bangor, etc., R.R. Co. v. Smith*, 47 Me. 34; *Medomak Bank v. Curtis*, 24 Id. 36; *Talladega Ins. Co. v. Landers*, 43 Ala. 115; *Taylor v. Agr., etc., Assoc.*, 68 Id. 229; *Scott v. Middletown, etc., R.R. Co.*, 86 N. Y. 200; *Grape Sugar, etc., Manf. Co. v. Small*, 40 Md. 395; *Pneumatic Gas Co. v. Berry*, 113 U. S. 322. See *Gilman, etc., R.R. Co. v. Kelly*, 77 Ill. 426.

receives and appropriates the proceeds of a transaction done in his name and by his assumed authority, there exists the highest possible evidence of his approval. These rules are elementary, and are grounded on the simplest ideas of justice in the dealings of men. They are also as plainly applicable to corporate as to other transactions where the dealing is within the powers of the corporation. In such a case, no possible reason can be suggested why a corporate as well as a private principal is not bound by the dealings of its agent which it has approved, and the benefit of which it has received and appropriated. . . . But corporations themselves, like other principals, may act and be bound in any of the modes not opposed to the general rules of law applicable to such bodies. They may previously resolve; they may subsequently acquiesce; they may expressly ratify; they may intentionally receive and appropriate the proceeds of an unauthorized transaction, and so put it out of their power to dispute its validity."¹ This could of course only be in relation to transactions which the corporation could lawfully become a party to, and not where the transactions were in violation of corporate rights and duties, such as would be void and impose no liability.² When the nature of the transaction is such as to allow it, the principal has an option to disaffirm the transaction and restore the benefits derived from it. But moneys expended and property applied by the agent in the faithful discharge of his duty, and for purposes within his authority, must be paid for by the principal.³ In an action against a municipal corporation to recover the price of a clock sold and delivered to it, it was held not necessary to show a vote of the corporation accepting the clock, but that evidence was admissible that the wardens and burgesses had taken charge

¹ COMSTOCK, J., in *Curtis v. Leavitt*,
15 N. Y. 9.

³ *Rider v. Union India Rubber Co.*,
5 Bosw. 85.

² *Miller v. Rutland & Washington*
R.R. Co., 36 Vt. 452.

of the clock, and caused it to be wound up and duly attended to from the time of delivery to the time of trial, a period of more than four years.¹ The public advertising of fare and freight by the president of a railroad company presupposes a delegated authority from the company, and its acts in receiving and appropriating the tolls thus established, recognize the existence of such authority in him.² The treasurer of a ferry company entered into a contract to loan one of its ferry-boats for a certain sum per day, to be rechartered at the highest obtainable rate, returning to the company one-half of any excess received over a rate named. The boat was rechartered to the government at a higher price, which was paid, and the same entered on the books of the company. The evidence was held sufficient to go to the jury that the company ratified the contract of the treasurer.³ A contract was entered into under the corporate seal between a telegraph company and the plaintiff by which he agreed to send all of his dispatches, and such others as he could influence, over its line, in consideration of the payment to him by it of a commission on

¹ Davidson v. Bridgeport, 8 Conn. 472. It was objected to the validity of a deed of trust that the board of directors, at which a resolution was adopted authorizing the creation of the trust and the execution of the deed, was not a regularly convened board according to the articles and by-laws of the association, and that therefore the deed, though bearing the signature of the proper officers, was not binding on the company. It was held that if there was a meeting of the board at which a quorum was present, and a resolution to the foregoing effect adopted, so long as the meeting on that day was not objected to by any of the officers or directors, then or at a subsequent time, how it was convened, and whether held or not in pursuance of the by-laws

as to the time of holding meetings, was not material. Leavitt v. Yates, 4 Edw. Ch. 134.

² Hilliard v. Goold, 34 N. H. 230. Authority of the treasurer of a corporation to accept drafts may be proved by showing that it was his practice, with the assent of the board of directors, to accept, and that the acceptance in question was recognized and treated as that of the company. Although the president could not confer the authority on the treasurer, his directions to that officer are admissible in evidence as a part of the history of the transaction when proved to have been sanctioned by the board of directors. Partridge v. Badger, 25 Barb. 146.

³ Brown v. Winnisimmet Co., 11 Allen, 326.

charges for transmission not to exceed £500 per year, and not to be less than £300. Subsequently the chairman of the company agreed verbally with the plaintiff to pay him an additional fifty per cent. for other services in collecting public information, and transmitting by the company's telegraph. This agreement was entered on the minutes of the company, and the sum of £302 paid thereon; and it was found that the services rendered under it had promoted the interests of the company. It was held that the parol agreement was binding on the company.¹ The promissory note of a corporation having been signed by its agent in the form customarily employed and approved by the corporation in similar cases, and the money for which it was given used by the corporation in its regular business, it was held a sufficient execution of the note by the corporation to go to the jury.² Where the president and treasurer of a corporation bought certain property, for which

¹ *Reuter v. Electric Telegraph Co.*, 37 Eng. L. & Eq. 189. The president and treasurer of a railroad company, in order to obtain gravel for the road, purchased in behalf of the company certain land and took a conveyance to themselves. They paid a small portion of the purchase money from the funds of the company, and gave the vendor their note for the balance. The company paid the interest on the note for a year and a half, when the president and treasurer, by order of the company, sold enough of the land to pay the note, and leave in their hands a considerable balance. Upon a suit in equity against them to obtain in behalf of the company such balance, and the title to the land held by them, to provide for the payment of certain notes made by the company to aid in the construction of its road, it was held the right and duty of the commissioners, as trustees and mortgagees, to sell the land to pay the notes, its purchase by the pres-

ident and treasurer as agents of the company having been ratified by it. *Church v. Sterling*, 16 Conn. 388. A railroad company proposing to construct a branch line, a landowner withdrew his opposition to the bill introduced into Parliament for that purpose in consideration of a contract entered into with him by the agent of the company to purchase at a specified rate per acre the land needed, and to pay a further sum for damages. Annexed to the contract was a map of the land to be taken. The project of making the branch line having been abandoned, and the land not taken, it was held that whether the agent of the company was or was not authorized to make the contract, as the company had acquiesced in and taken the benefit of it, it was binding on them. *Stuart v. London & Northwestern R.R. Co.*, 16 Jur. 209; 10 Eng. L. & Eq. 57.

² *Mead v. Keeler*, 24 Barb. 20.

they gave several promissory notes in the corporate name, and the corporation afterward took possession of the property and used it, it was held that this constituted a ratification by the corporation, although the notes might have originally been given without authority.¹ The cashier of a bank, with the knowledge and approval of the directors, but without express authority for that purpose, offered a large reward for the detection of thieves who had stolen money from the bank. It was held, that if the bank had notice of the offer, and did not object to it, ratification and assent must be presumed; that it was not necessary to give notice to the directors when sitting in their official capacity, but that if they were personally cognizant of the offer made by the cashier, it was their duty to call a meeting of the board and disavow the act if they were unwilling that the bank should be bound by it.² The treasurer of a corporation endeavored to get parties who had sold it coal to agree to take a company note for the debt, which they declined to do, but agreed to take B.'s note, who was president of the company. B., when applied to by the treasurer to give his individual note for the demand, refused, but indorsed a blank note, signing as president. This the treasurer filled up with B.'s name as payee, and erased the word "Prest." from his signature as indorser, and passed the note over to the vendors of the coal in payment for the debt due by the company to them, they having no knowledge of the erasure, and knowing that B. was president of the company. Held the note of the company.³ The directors of a bank having voted at a meeting that two of the members of the board should be a committee to sell and transfer any estate or property owned by the bank, the committee gave a mortgage on its real estate to secure a judgment recovered against the bank on its bills, receiving from the mortgagee

¹ Moss v. Rossie Lead Mining Co., 5 Hill, 137.

² Kelsey v. Nat. Bank, 69 Pa. St. 426.

³ Sharpe v. Bellis, 61 Pa. St. 69.

at the same time a bond conditioned that he would not put those bills in circulation for twelve months; and thereupon the cashier paid the costs of the creditor's suit as part of the adjustment. It was held that the evidence showed a ratification by the board of the acts of the committee.¹ A corporation was authorized to make by-laws for the regulation of the society, and to choose such officers as might be thought expedient. The by-laws provided for the election of a treasurer and board of trustees, prescribing their duties, and they were required "to manage the finances and property of the society, and to settle and exhibit the state of the treasury annually." Subsequently, the society authorized the trustees to "proceed immediately in appropriating the funds of the society in erecting a suitable edifice," which they did, making personal contracts for the purpose, and when they had exhausted all the funds of the society, they found a deficiency, for which they were personally responsible. This, in their annual exhibit of the state of the treasury, they reported as the debt of the society, and, at a meeting of the society held the same day, their report was accepted and ordered to be recorded. It was held, that this amounted to a ratification by the society of the acts of the trustees, and an assumption of the balance due.² The deed of settlement of a life insurance company provided that the corporate seal should not be affixed to policies, except upon the written order of three directors, countersigned by the manager, and that every policy should be signed by not less

¹ *Burrill v. Nahant Bank*, 2 Metc. 163. The records of a corporation contained no vote of either the directors or stockholders, authorizing a mortgage on personal property belonging to the corporation, which was given by the president, who was the general manager of the corporate business; but the execution and delivery of the instrument was known to all of the di-

rectors, excepting one who was absent in Europe, and was approved by them. It was held that it was the act of the corporation. *Sherman v. Fitch*, 98 Mass. 59. It is competent for a committee of a corporation to ratify the acts of a party done by direction of a minority of its members. *Hanson v. Dexter*, 36 Me. 516.

² *Hayward v. Pilgrim Soc.*, 21 Pick. 270.

than three of the directors, and sealed with the common seal. The books containing minutes of the proceedings were to be open to the inspection of shareholders. A policy was duly executed, but without any previous order. The company, in its negotiation with the insured, treated the policy as valid. It was held that it could not avoid liability on the policy on the ground that it was executed without authority.¹ Where a committee of a corporation entered in its behalf into a submission of demands to referees under the statute, they declaring themselves duly and legally authorized for that purpose, and the corporation attended before the referees, and submitted to them its proofs and allegations, without objecting to the submission, it was held that it would be presumed that the committee had due authority.² It is sufficient proof of a ratification of the issuance by corporate officers of a certificate of stock, that at a regular meeting of the stockholders, a resolution was passed for payment in the bonds of the corporation of the interest on such certificate.³

If the principal adopts part of the act of its agent, with full knowledge of the circumstances, he thereby ratifies the whole, an acceptance of the benefits of the transaction imposing an obligation to assume its burdens, and operating

¹ Prince of Wales Life Ass. Co. v. Harding, Ell. Bl. & Ell. 183.

² Proprs. of Fryeburg Canal v. Frye, 5 Me. 38.

³ McLaughlin v. Detroit, etc., R.R. Co., 8 Mich. 100. With respect to third persons, although the directors of a bank may not have been chosen strictly according to the provisions of the statute, or complied in all respects with the provisions of the law defining and regulating their duties in the appointment of a cashier, yet if they were chosen and recognized by the bank, and they appointed a cashier who acted

by their direction, debtors of the bank cannot object that the directors were not properly chosen. Cooper v. Curtis, 30 Me. 488. Where an action was brought on promissory notes by the direction of an advisory committee of a corporation, who were *de facto* the agents of the company, and no other persons claimed to act in that capacity, it was held not competent for the defendant to resist payment on the ground that the committee were not duly elected and authorized to act as such. Charitable Assoc. v. Baldwin, 1 Metc. 359.

to confirm it as a whole.¹ But no ratification will estop the principal unless he has been made aware of all of the material facts and circumstances that would in any way influence his mind or affect the value of the contract.² Such ratification can only be presumed when the party from whom it is inferred must be supposed in all probability either to have known, or at least to have been in a position where he must have been negligent if he did not know, the acts of the agent to which his assent will be assumed in the absence of dissent.³ A railroad inspector removed the plaintiff from the cars because he had no ticket, did not pay his fare, and was drunk; imprisoned him, took him before a magistrate, and preferred a charge against him. There being nothing going to show that the fact that the plaintiff was in custody was known to the company, it was held that there was no evidence of ratification to go to the jury.⁴ The execution of a mortgage of personal property in behalf of a corporation by its president and the general manager of its business, with the knowledge and concurrence of all of the directors except one, who is absent in Europe, or with their subsequent and long-continued acquiescence, may properly be regarded as the act of the corporation; and where the validity of the mortgage depends wholly upon its ratification after it is recorded, there need not be a new record, the ratification relating back.⁵ A

¹ U. S. Rolling Stock Co. v. Atlantic, etc., R.R. Co., 34 Ohio St. 450. A contract was entered into with the plaintiff for the benefit of a railroad company, not then, but afterward established, and the withdrawal of the plaintiff's opposition, which was part of the contract, enabled the company to obtain its act of incorporation. But the charter having been obtained, nothing further was done. It did not distinctly appear that the railroad had been abandoned; but no money was paid, no land taken, or any movement made

toward carrying out the scheme, and the compulsory powers of the act had ceased. It was held that the company had not adopted the agreement. *Goody v. Colchester & Stone Valley R.R. Co.*, 19 L. T. 334; 15 Eng. L. & Eq. 596.

² *Gilman, etc., R.R. Co. v. Kelly*, 77 Ill. 426.

³ *Hotchin v. Kent*, 8 Mich. 526.

⁴ *Eastern Counties v. Broom*, 15 Jur. 297; 2 Eng. L. & Eq. 406. See *Roe v. Birkenhead*, 21 L. J. N. S. Exch. 9; 7 Eng. L. & Eq. 546.

⁵ *Sherman v. Fitch*, 98 Mass. 59.

principal actively or constructively chargeable with knowledge that his agent is in fact transcending his authority will be bound.¹

A corporation will be bound by the acts of its agent if, either through inattention or otherwise, it permit him to pursue a particular line of conduct for a considerable period without objection.² Accordingly, where the directors of a bank allowed its cashier to conduct all of its business without interference for several years together, they were held to have thereby conferred upon him authority as to third persons to transact any business in behalf of the bank which its charter did not prohibit him from transacting.³

Ratification from long silence is a question for the jury.⁴ What constitutes a reasonable time within which the principal, after being informed of what has been done by the agent, must dissent therefrom, or he will be presumed to have ratified the acts of the agent, will in a great measure depend upon the particular circumstances of the case. Where the consequences of delay are, or may prove, injurious to the other contracting party, especially where large expenditures to the knowledge of the principal are being made on the faith of the validity of the contract, the

¹ Exchange Bank v. Monteith, 17 Barb. 171. A husband trusted his wife with certain money, which he directed her to deposit in some bank, and she accordingly opened an account in her own name with a bank, and made deposits from time to time. She gave directions at the bank as to the manner in which the money standing to her credit was to be drawn out on her checks, and she presented checks at the bank from time to time until the whole amount was drawn out by her. The bank had no knowledge that she was a married woman until after it had paid all the checks and closed her account. It was held that in the absence

of any circumstance to charge the bank with notice that she was a married woman, it had a right to open an account with her as a *feme sole*, and to pay her checks; and that as the husband, by intrusting his wife with the money, had enabled her to commit the fraud, the loss must fall upon him. Dacy v. N. Y. Chemical Manf. Co., 2 Hall, 550. See Fulton Bank v. N. Y. & Sharon Canal Co., 4 Paige Ch. 127.

² Beers v. Phoenix Glass Co., 14 Barb. 358; Caldwell v. Nat. Mohawk Valley Bank, 64 Id. 333.

³ City Bank v. Perkins, 4 Bosw. 420; aff'd 29 N. Y. 554.

⁴ First Nat. Bank v. Reed, 36 Mich. 263.

law requires prompt action on his part if he would avoid responsibility for the acts of the agent.¹ In *Smith v. Clay*,² Lord CAMDEN said: "A court of equity has always refused its aid to stale demands where a party has slept on his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced." When the adoption of any particular form or mode is necessary to confer the authority in the first instance, there can be no valid ratification except in the same manner.³

§ 110. **Appointment of sub-agents.**—In all cases of delegated authority where the delegation indicates any personal trust or confidence reposed in the agent, and especially when such personal trust is implied by making the exercise and application of the power subject to the judgment or discretion of the agent, the authority is purely personal and incapable of being delegated to another unless a special power of substitution be added. The reason and policy of this rule apply to authority conferred by legislative act.⁴ "It is quite clear," said the court in an early case in Massachusetts, "that where there is no assent of the principal, either express or implied, an agent or attorney cannot delegate his authority to a sub-agent so as to authorize him to bind the principal, especially in matters which require any degree of judgment or discretion however small."⁵ Mr. KENT⁶ says: "An agent ordinarily, and without express

¹ *U. S. Rolling Stock Co. v. Atlantic, etc., R.R. Co.*, *supra*.

² 3 Bro. C. C. 639, *n*.

³ *Despatch Line of Packets v. Belamy Manf. Co.*, 12 N. H. 205.

⁴ *Lyon v. Jerome*, 26 Wend. 485.

⁵ WILDE, J., in *Brewster v. Hobart*, 15 Pick. 302.

⁶ 2 Com., 9th Ed., 855, 856. But

where a sub-agent appointed to buy stock and sell goods for a trading company advertised himself as the agent of the company by the sign over the shop-door, it was held that although the company was not liable on promissory notes made by him in its behalf, yet that it was liable for purchases under an implied recognition of his acts,

authority, or a fair presumption of one growing out of the particular transaction or the usage of trade, has not the power to employ a sub-agent to do the business without the knowledge or consent of his principal. The maxim is that *delegatus non potest delegare*, and the agency is generally a personal trust and confidence which cannot be delegated ; for the principal employs the agent from the opinion which he has of his personal skill and integrity, and the latter has no right to turn his principal over to another of whom he knows nothing."

Even although the general administration of the affairs of the corporation be intrusted to an agent, his authority to appoint sub-agents cannot be implied ; for a confidence is supposed to exist between principal and agent which is not communicated to sub-agents selected and appointed by the agent. It would not be safe to allow persons of this description to enter into written contracts binding the company. It would be difficult to limit such transactions, and be unreasonable to commit the interests of the corporation to a multitude of inferior agents not appointed by it. It being the duty of the directors to make no calls for subscriptions until the interests of the corporation required it, to call for no greater instalments than might be needed, and to adjust the times of payment so as to cause as little inconvenience as possible to subscribers, it was held that as the proper determination of these various matters required the exercise of judgment and discretion in a greater or less degree, the directors could not delegate their power to the treasurer.¹ Where the power to allot shares was conferred upon the directors, and a shareholder, who had been offered some reserved shares, accepted them conditionally, but the board of directors did not expressly assent to such condi-

Emerson v. Providence Hat Manf. Co., 12 Mass. 237. Co. v. Chase, 56 N. H. 341. Read v. Memphis Gayoso Gas Co., 9 Heisk.

¹ Silver Hook Road v. Greene, 12 R. Tenn. 545. I. 164. See Farmers' Mu. Fire Ins.

tional acceptance, but resolved that the shares remaining undisposed of should be allotted at the discretion of two of the directors, and the manager afterward wrote to the shareholder that the shares he had accepted had been allotted to him, it was held, approving the decision of the vice-chancellor, that the board of directors could not delegate their power in respect to allotting shares.¹ It was held that stockholders who were authorized to inquire into and determine as to the regularity of distribution of dividends, and to order the sums so paid to be refunded, could not delegate such power.² And where there was no provision in the charter for a sale of shares for unpaid assessments thereon except by order of the directors, it was held that they could not delegate power to a committee to order such a sale.³ The by-laws of a corporation provided that there should be nine directors, a majority of whom should constitute a quorum for the transaction of business; that the directors should exercise a general superintendence and control over the affairs of the corporation, should have power to sell its lands, and might direct and authorize the treasurer in all such cases to sign, and affix the seal of the corporation to the deeds. A power of attorney, executed by the treasurer of the corporation, and approved by a majority of the directors, authorized one R., among other things, to enter upon all the lots claimed by the corpora-

¹ *In re Leeds Banking Co.*, L. R. 1, Ch. 561.

² *Gratz v. Read*, 4 B. Mon. 178.

³ *York & Cumberland R.R. Co. v. Ritchie*, 40 Me. 425. The corporate seal may be affixed by a less number of directors than is required to constitute a board if it be authorized by the board. *Van Hook v. Somerville Manf. Co.*, 1 Halst. Ch. 137. The rights, authority, and mode of transacting the business of a corporation do not depend upon the common law, but upon the act of incorporation, and where

that is silent, upon the principles of interpretation and doctrines of the common law. But this latter source of power cannot control by implication an express provision of the charter, or create an authority to do what is not necessary to give effect to the intention of the legislature, or confer upon a particular member or officer the right to do that which the act has made several persons or a board of directors competent to perform. *Spyker v. Spence*, 8 Ala. 333.

tion when the conditions of the deeds had been violated, and to hold and improve the same, "or to lease the same to such persons, and for such times and rents and on such conditions as he may deem proper, or any part of said lots, or of said buildings." It was held that the foregoing attempted delegation of authority by the directors to R. was void.¹ The making of discounts by a bank being required by the charter to be by the act of directors, it was held that it could not be committed to an agent of the board.² Where a committee, appointed by the directors of a turnpike company, entered into a contract with a person, under their hands and seals, to construct a portion of the turnpike, it was held that the contract was not binding on the corporation unless it gave the directors, its immediate agents, a power to substitute agents under them.³ The charter of a railroad company provided that in case any subscriber or stockholder should neglect to pay any assessment on his shares for thirty days after such notice was given as should be prescribed by the by-laws of the company, the directors might order the treasurer to sell such shares at public auction, and the delinquent subscriber be held accountable to the corporation for the balance if his shares should sell for less than the assessments due thereon. At a meeting of the directors it was voted that the president, together with the treasurer, be a committee to adopt such measures as should be most effective for collecting the arrearages of subscriptions due, and enforce the collection by sales of stock, or preliminary employment of an attorney to collect said dues, or in both ways, as the committee

¹ Gillis v. Bailey, 21 N.H. (1 Fost.) 149.

² Percy v. Millandon, 3 La. 364.

³ Tippets v. Walker, 4 Mass. 595. Where the charter of a corporation provided that there should be a high steward, and imposed upon him various judicial and ministerial duties, but did not give him power to appoint a dep-

uty, it was held that he could not appoint a deputy generally to discharge all of the ministerial duties of his office. Whether if the appointment had been to do some particular act, and the corporation had allowed him to do it, that would have been valid, *quere*. Rex v. Gravesend, 2 Barn. & Cross. 602.

should think proper. It was held that as no provision was made in the charter for a sale of shares for unpaid assessments, except under an order of the directors for that purpose, the directors could not legally delegate power to a committee to order such a sale, and that when the order was given by a vote of the directors, it should be absolute, and not in the alternative.¹ The board of directors of a corporation does not stand in the same relation to the corporate body that a private agent holds toward his principal. Its power is in a very important sense original and undelegated. The stockholders do not confer, neither can they revoke the power, which is derivative only in the sense that it is received from the State in the act of incorporation. The directors, convened as a board, are the primary possessors of all the power which the charter confers, and, like private principals, they may, in general, delegate to agents of their own appointment the performance of any acts which they themselves can perform.²

Although the charter of a corporation provides that its powers shall be exercised by a board of twenty-three directors, the board may delegate its authority to subordinate agents, to committees, or to a quorum consisting of less than a majority of the whole number of directors.³ A clause in the act of incorporation whereby the company was authorized at any general or special meeting to order and dispose of the custody of the common seal and its use

¹ *Elmer v. Pennel*, 40 Me. 430.

² *Hoyt v. Thompson*, 19 N. Y. 207; *Burrill v. Nahant Bank*, 2 Metc. 163. In an action by an incorporated religious society to recover the price of a pew, it was proved that one of the members of the vestry had acted as auctioneer in the sale of the pews, and had at the time made a memorandum of the sale, containing the name of the defendant as purchaser, and the price at which he bid off the pew. It was

held that the corporation had an undoubted right to employ one of its members as agent, and that his corporate interest did not disqualify him from also being, within the meaning of the statute of frauds, an agent of the purchaser. *Stoddert v. Vestry of Port Tobacco Parish*, 2 Gill & Johns. 227.

³ *Palmer v. Yates*, 3 Sandf. 137. See *Leavitt v. Blatchford*, 5 Barb. 9; s. c. 3 Comst. 19.

and application, was held to authorize it to make rules and regulations for the custody of the seal ; but did not require the concurrence of the company in each particular act of sealing, and that a bond to which the seal had been affixed by the company's clerk under a general authority of the directors was valid.¹ The board of directors may authorize an agent to draw bills of exchange in behalf of the corporation, when not forbidden by the charter, and such authority may be conferred by them without writing.² The directors of a trading company, a portion of whose business was to accept bills of exchange, and whose articles gave to the directors the most extensive powers of management, adopted a resolution authorizing the chairman to accept bills drawn on the company by L. upon L.'s depositing security to a specified amount. The chairman accordingly accepted the bills, and L. deposited some securities, but not nearly to the required amount. The directors by resolution affirmed the transaction without knowing that sufficient securities had not been deposited. It was held, sustaining the decision of the Master of the Rolls, that the bills were binding on the company.³ A board of directors of a bank may delegate an authority to a committee of their own number to alienate or mortgage real estate, and an authority to convey necessarily implies an authority to

¹ Hill v. Manchester, etc., Waterworks Co., 5 Barn. & Ad. 866.

² Preston v. Mo. & Pa. Lead Co., 51 Mo. 43.

³ Overend, *ex parte*, L. R. 4, Ch. 460. GIFFARD, L. J.: "I think it is quite enough to put the case simply upon this, that the acceptance of the bills was a transaction plainly within the powers of the company ; that it was a transaction plainly within the powers of the board of directors ; that the fact that these bills were accepted and handed over was perfectly well known to the board of directors, and that

whether it was assented to by them with or without knowledge as to the securities which were taken, is, in my opinion, quite immaterial. There was, at all events, a representation to the public by the agents of the company, who were instructed to carry out this transaction, that everything was rightfully done ; and I am of opinion that it does not lie in the mouth of the company to assert that what was so represented to be rightly done, was not carried out according to the precise terms specified."

execute suitable and proper instruments for that purpose;¹ and they may authorize one of their number to transfer securities belonging to the bank.² By a statute, the president and directors of a railroad company were authorized to exercise all the powers granted to the corporation for the purpose of completing their railroad, and for the transportation of persons, goods, and merchandise thereon. It was held that there was nothing in the nature of the power to establish the rates of freight which necessarily limited it to the directors personally, but that it might be exercised by their agents, and that the assent of the directors would be presumed; unless there was some evidence of dissent.³ It was held in New York that a banking association under the general law might by its articles of association and by-laws divide the business it was authorized to transact into several distinct departments, and constitute a separate board of directors for each department; or it might intrust to a separate committee of the directors the exclusive charge of each department, clothing that committee with all of the powers of a board in relation to the business which its department embraced.⁴ The cashier of a bank, while carrying out under the orders of the directors a lawful contract, is not a sub-agent of the board, but an officer of the corporation.⁵

§ III. General rule as to liability on written instruments.—The liability of the principal depends upon the facts—1st, that the act was done in the exercise; and 2d, within the limits of the powers conferred. These facts are necessarily

¹ Hoyt v. Thompson, *supra*.

² Burrill v. Nahant Bank, *supra*.

³ Manchester, etc., R.R. Co. v. Fisk, 33 N. H. 297.

⁴ Palmer v. Yates, 3 Sandf. 137.

⁵ Bank of Ky. v. Schuylkill Bank, Parsons' Sel. Cas. 180. Drafts drawn in favor of the cashier of a bank and discounted by the bank, are in law

drawn in favor of the bank. Wright v. Boyd, 3 Barb. 523; Davis v. Branch Bank of Mobile, 12 Ala. 463. The same is true in relation to a letter from or to the cashier of a bank with reference to the business of the bank. New Hope, etc., Bridge Co. v. Phoenix Bank, 3 Comst. 156.

inquirable into by a court and jury ; and this inquiry is not confined to written instruments, but embraces every act with or without writing within the scope of the power or confidence reposed in the agent.¹ When an agent is limited to certain means to be employed by him, a person dealing with him cannot hold his principal liable if the means selected are beyond the limits of the agent's authority. But when the end only is pointed out, while the means are left to the agent's discretion, the principal is bound not only as to the end, but the means also ; and third persons dealing with the agent in good faith have a right to insist upon the responsibility of the principal to this extent. As to such persons, the agent will be regarded as acting within his authority, not only with respect to the object of his agency, but in relation to the means selected by him for its attainment as to which he has been intrusted with discretionary powers.²

When a sealed instrument is executed by an agent or attorney for the principal, the strict technical rule of the common law requires that it shall be done in the name of the principal in order to make it his deed. In such case the law looks not to the intent alone, but to the fact whether that intent has been carried out in such a manner as to possess legal validity.

¹ *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326. Whenever a corporation is acting within the scope of its legitimate purposes, all parol contracts made by its authorized agent are express promises of the corporation, and all duties imposed upon it by law, and all benefits conferred at its request, raise implied promises for the enforcement of which an action will lie. *Dunn v. St. Andrew's Church*, 14 Johns. 118.

² *Johnston v. Southwestern R.R. Bank*, 3 Strobb. Eq. 263. It is a well-settled and familiar rule that a contract made by an agent within the scope of

his authority is binding upon the principal, though contrary to the agent's instructions, if the other party was ignorant of that fact. *Mt. Olivet Cemetery Co. v. Shubert*, 2 Head Tenn. 116. And the liability of a corporation will not be varied although it appear that its agents, acting within the scope of their authority, contracted in their own name without disclosing that of the principal. If in such case the exclusive credit be not given to the agent, the principal is also liable. *Thompson v. Davenport*, 9 B. & C. 78 ; *Higgins v. Senior*, 8 Mees. & Welsb. 833 ; *Conroy v. Port Henry Iron Co.*, 12 Barb. 27.

But a more liberal rule obtains as to instruments not under seal, especially in commercial and maritime contracts. In such cases, in furtherance of the public policy of encouraging trade, if it can be collected from the whole instrument that the true object and intent of it are to bind the principal and not merely the agent, courts of justice will adopt that construction of it, however informally it may be expressed.¹ It does not necessarily follow that a contract made by an authorized agent which does not bind the principal, becomes the agent's contract, and makes him answerable if it is not performed. This depends upon the legal effect of the terms of the contract. If the agent employ such terms as legally import an undertaking by the principal, the contract is the principal's, and he alone is bound by it. But if the terms of the contract legally import an undertaking of the agent, and not of the principal, then it is the contract of the agent, and he is answerable for a breach of it.² Even a person who, having no authority

¹ *New England Marine Ins. Co. v. De Wolf*, 8 Pick. 56; *Merchants' Bank of Macon v. Central Bank of Ga.*, 1 Kelly Ga. 418; *Evans v. Wells*, 22 Wend. 188. Where it appeared that a note belonging to the bank was indorsed by L., the president, calling himself attorney, and it was objected that, admitting that L. was regularly constituted the attorney of the corporation for the purpose of indorsing the note, yet that the manner in which he had executed the power, defeated his purpose, as he had not declared that he had acted for and in behalf of the bank, which, it was said, was the only legal way in which an attorney could bind his principal, or transfer his authority. PARKER, C. J., said: "There are authorities which tend to support this objection. But they seem to be chiefly applicable to deeds or instruments under seal, and to questions of

the liability of the principal, or of the attorney because he had not bound his principal. We are not satisfied that the same strictness is required to personal simple contracts, and especially to those of a commercial nature; it being certain that even a letter of attorney under seal is not necessary to enable one person to bind another in very important contracts in transactions of that nature." *Northampton Bank v. Pepoon*, 11 Mass. 288.

² *Abbey v. Chase*, 6 Cush. 54. At a meeting of a church vestry a resolution was passed that, in order to finish the church edifice, the vestry, or those of them who would consent to the plan, would agree to complete the church on their own responsibility, and that, in order to reimburse them, the pews should be sold at auction, and also that the profits of a church lottery should belong to them. A resolution

whatever to act as another's agent, assumes so to act, and makes either a deed or a simple contract in the name of the other, is not personally liable on the covenants in the deed, or on the promise in the simple contract, unless it contains apt words to bind him personally.¹ The general rule in relation to agencies is, that when authority is given to two or more persons to do a private act, the act is valid to bind the principal only when all concur in doing it.²

There is a well-settled distinction between a general and a special agent. As to the former, the principal is responsible for what the agent does when acting within the general scope of his authority ; but where the agent is special and temporary, the principal is not bound if the agent exceeds his particular employment.³ There is also a distinction between contracts made with private agents and agents acting in behalf of the public, as regards their personal responsibility. It is not to be presumed either that a public agent intends to bind himself personally in acting as a functionary of the public, or that the party dealing with him in his public character means to rely on his individual responsibility.⁴

§ 112. Liability of principal on sealed instrument.—Although the instrument be executed by the agent informally, and in his own name, yet if it clearly appears that the contract was in reality made with the corporation, and it was so understood by both parties, it will bind the principal. Where a railroad company, for the purpose of raising money

was passed naming certain members as a building committee, with power to contract for workmen, materials, etc., and two others were appointed agents for the purpose of managing the lottery. It was held corporate acts pledging corporate funds, and that the members of the vestry incurred no personal liability. *Vincent v. Chapman*, 10 Gill & Johns, 279.

¹ *Mott v. Hicks*, 1 Cowen, 513; *Pitman v. Kintner*, 5 Blackf. 250.

² *Story on Agency*, sec. 44; *Despatch Line of Packets v. Bellamy Manf. Co.*, 12 N. H. 205.

³ *Munn v. Commission Co.*, 15 Johns. 44.

⁴ *Ghent v. Adams*, 2 Kelly Ga. 214.

with which to purchase rails for its road, authorized the directors to cause a mortgage to be given on the road and its franchises, which they voted the president should do, and he executed a mortgage so defective in form as to prevent it from being in contemplation of law the deed of the corporation, and they received and used the money for the completion of the road, it was held that the transaction, in equity, operated as an equitable mortgage.¹ Persons constituting a building committee of a religious corporation having been duly authorized to purchase the materials, entered into a written contract which they severally signed and sealed, describing themselves as a building committee for the manufacture and delivery of a quantity of brick. It was held that the members of the building committee did not incur any personal liability, but that the corporation alone was liable on the contract.² Lands having been sold at auction in behalf of a municipal corporation, the mayor and purchaser signed a contract in which they mutually promised to fulfil the conditions of sale on their respective parts. The conditions stated the title of the corporation to

¹ *Miller v. Rutland and Washington R.R. Co.*, 36 Vt. 452. In this case the court said: "We do not fully apprehend the ground or purpose of the remark that the private intention of Clark to make a mortgage against the company is of no avail if it cannot be carried out by the rules of law. If it be meant that the mortgage, failing as to its technical sufficiency to constitute at law a valid mortgage against the company is of no avail for any purpose, we think it unfounded in principle, and not sustained by authority. If it be meant that the act of Clark, merely in pursuance of his private intention, would not affect the company, we assent to it; but this does not meet the point; for it appears on the face of the instrument in connection with the votes

of the directors, that he was authorized to make a mortgage that should technically convey the estate; that his agency in that behalf was for that very purpose, and that in what he did, his design was to accomplish the purpose of his agency. We think this intent is so manifested as to give it legal validity in the language of the brief, not as a technical mortgage operative to convey the legal estate, but as evidence in writing as to the contract that at the same time answers the requirements of the statute of frauds, and furnishes ground for asserting an equitable right in and to the security contracted to be given."

² *Haight v. Sahler*, 30 Barb. 218. See *Dubois v. Del. & Hudson Canal Co.*, 4 Wend. 285.

the premises, and stipulated that it should convey, and might resell on default. The only act mentioned to be done by the mayor was the receiving of the deposit. It was held that he could not maintain an action in his individual capacity against the purchaser for a breach of the contract.¹ A bond as follows: "Know all men by these presents, that," etc. (naming the corporation), "by W. R., President of said company as principal, and Q. M. & S. M. as sureties, are held and firmly bound unto," etc., "to which payment well and truly to be made, we do bind ourselves, our heirs, executors, and administrators, and every of them firmly by these presents. Sealed with our seals. W. P., Prest., (seal), Q. M., S. M.," was held not to bind the president personally.² An assignment of a mortgage of real estate concluded thus: "In witness whereof, the said B. C. bank, by G. A., their treasurer, duly authorized for this purpose, have hereunto set their name and seal." Signed, G. A., Tr. B. C. Bank, and acknowledged by G. A. to be the act and deed of the B. C. bank and of himself. It was held to be the act and deed of the corporation.³ A promise by the president and directors of a corporation, made for a corporate debt, executed by the president as such, under the corporate seal, in conformity with its by-laws, is a promise by the corporation for a violation of which it may be sued in its corporate name.⁴ A contract under seal, executed by a duly authorized agent in behalf of the corporation, though not binding as a specialty, may sometimes be enforced as a simple contract. Where two trustees of a parish, who constituted a corporation, appended their names separately to a lease, and affixed the corporate seal separately to each name, it was held that although it was not necessary to sign in that way, yet it did not vitiate the lease as a corporate act.⁵ A committee of the corporation of the city of Albany,

¹ Bowen v. Morris, 2 Taunt. 374.

² Ellis v. Pulsifer, 4 Allen, 165.

³ Hutchins v. Byrnes, 9 Gray, 367.

⁴ Pitman v. Kintner, 5 Blackf. 250.

⁵ Jackson v. Walsh, 3 Johns. 226.

duly authorized, entered into a contract for the benefit of the corporation, and signed thereto their names, and affixed their individual seals, covenanting to make certain payments and advances to the other contracting party. In an action against the individual members of the committee, it was held that the authority of the committee being conceded, the instrument executed by them was evidence of a promise by the corporation.¹ Where an indenture was sealed with the respective seals of three persons claiming to act in behalf of a corporation, and to have been duly authorized to do so, but there was no allegation that the seal of the corporation was affixed, and no such seal was in fact affixed to the agreement, it was held that although the corporation would be liable for a breach of the contract in some form of action, an action of covenant could not be maintained thereon.² The directors of a corporation, being duly authorized, entered into a contract with a person for certain building materials to be furnished by him, and the directors, who were individually named, affixed to the contract their names and their several seals. It was held that an action of assumpsit might be maintained against the corporation for the price. WESTON, C. J., said: "Suppose the agent, clothed with power to contract by a corporation, affixes to an instrument his own name and seal, although it is not the deed of the corporation, yet if it would bind them as an agreement if it were not under seal, there is no reason for its ceasing to bind them, the agent's seal being affixed thereto, except what is purely technical. The agent has super-added a more solemn authentication which usually converts it into an instrument of a higher character. But, as the corporation cannot be affected by this additional quality, it not being their deed, shall it cease to be evidence of their agreement? They authorized it, their agent made it, and

¹ Randall v. Van Vechten, 19 Johns. 60.

² Mitchell v. St. Andrew's Bay Land Co., 4 Fla. 200.

if he added formalities which were useless and inoperative, they may be disregarded, and the corporation stand charged as if they had been omitted. A covenant is a promise and something more. It is a promise under seal. If the seal affixed is not that of the party who substantially makes the promise, and who is to be charged by it, the promise remains and is not changed into a contract of a higher nature."¹ A contract was entered into by an incorporated turnpike company and one Hopkins, by which the latter was to complete the mason work of a bridge, and furnish the materials, and the corporation to pay him therefor a specified sum. The agreement closed as follows: "For the true and faithful performance of the covenants, agreements, and stipulations in these presents contained, the parties hereto bind themselves, each to the other, in the penal sum of two thousand dollars. In witness whereof, the said parties to these presents have hereunto interchangeably set their hands and affixed their seals. James Mehaffy, (seal), Joseph Hopkins, (seal). Signed by the president in behalf of the president, managers, and company of the Manchester Turnpike Road, and by Joseph Hopkins on his part, in presence of William Child." An action of covenant broken having been brought by Hopkins against Mehaffy, the president, it was held that the defendant was not liable.² Where a mortgage is signed by the president and

¹ *Cram v. Bangor Proprietary*, 12 Me. 354.

² *Hopkins v. Mehaffy*, 11 Serg. & Rawle, 126. GIBSON, C. J.: "The paper is not the defendant's deed. He sealed and delivered it undoubtedly; but there is something more than sealing and delivery necessary to a deed. It ought to contain the proper parts of a contract; and in this instrument there are no obligatory words applicable to the person of the defendant. Even the sealing and delivery were as the president, and in behalf of the cor-

poration. If the defendant had authority to contract for the corporation, although he has done so informally, there cannot be a doubt that, as the work has been done, the plaintiff may have an action of some sort against it. But he never treated on the basis of the defendant being personally answerable, and to permit him to maintain this action, would permit him to have what was not in the contemplation of either party, recourse to the person of the agent."

cashier of a bank, and sealed with the common seal, there is *prima facie* a due and lawful execution of the instrument, the common seal of a corporation to an instrument being evidence that it was affixed by proper authority. To show the contrary, the burden of proof is on the objecting party, and he will be required to produce such evidence as shall be clear and satisfactory.¹

§ 113. **Liability of principal on simple contracts.**—When an agent, in entering into a contract without authority, acts within his apparent authority, the principal is bound, unless the party with whom the contract is made knows that he is exceeding his power as agent.² Although an agent may make himself personally liable on a contract made for the benefit of the principal, and will do so if he contracts in his own name and his principal is unknown, yet when the relation of principal and agent is known to exist, and the fact that the agent is acting solely for the benefit of such principal, the agent will not be bound unless the credit is given to him expressly and exclusively, and it was clearly his intention to bind himself personally.³ A corporation will be bound by an agreement signed by its agent, duly authorized and acting in relation to business usually transacted by him, notwithstanding the charter provides that all agreements shall be signed by the president and secretary.⁴ A pro-

¹ Leggett v. N. J. Manf. & Banking Co., Saxton Ch. 541. An agreement by deed made with a corporation, and delivered to the agent of the corporation having authority to negotiate it, is delivered to the corporation. Western R.R. Corp. v. Babcock, 6 Metc. 346.

² Harrison v. Missouri Pacific R.R. Co., 74 Mo. 364.

³ Haight v. Sahler, 30 Barb. 218. If, by the terms of an agreement, a party describing himself as agent, undertakes to do certain things, the mere addition of the word agent, or indeed any other designation applied to his name, will

not make it the contract of his principal. Such addition will be regarded as description, and will not have the effect of binding a third person who is not in form made a party to the instrument. It is not enough that the person executing an instrument have power as agent to bind a third person; he must, in fact, make it the obligation of that person in terms, in order to bind him. Detroit v. Jackson, 1 Doug. Mich. 106, per FELCH, J.

⁴ New England Fire & Marine Ins. Co. v. Schettler, 38 Ill. 166.

vision of the charter of a bank, that all contracts whatever, in order to charge the company, must be signed by the president and countersigned by the cashier, was held not to apply to such contracts or engagements as occurred in or were necessary to the ordinary business of the corporation, usually performed by the cashier or some other officer or agent of the bank, such as drawing or indorsing bills of exchange, checks, drafts, etc.¹ The cashier of a bank will not be presumed to have power, by reason of his official position, to bind the bank as an accommodation indorser of his own promissory note, such a transaction not being within the scope of his general powers.² In *Bank of Columbia v. Patterson*,³ one of the points considered was whether the bank could be bound by a contract not made by the corporation, but by its committee acting in their own names, who had personally and expressly agreed to pay the stipulated price. It being a contract made for the benefit of the corporation, and the committee having authority to make it, it was held that the corporation was bound. STORY, J. : "It would seem to be a sound rule of law, that wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation." Where an attorney of a railroad company contracted in that character, but the concerns of the company were entirely managed by him, there being no acting committee, it was held that the attorney was not personally liable on such contracts.⁴ The description of a contracting party in the body of an agreement, under the statute to submit matters in difference to arbitration, was, "The Mayor, Aldermen, and Freemen of the city of Detroit, by Zina Pitcher, Mayor of said city, and agent for that purpose duly ap-

¹ *Carey v. McDougald*, 7 Ga. 84. See *Shawnee County Bank*, 95 U. S. (5 Otto) 557; *S. C. 3 Dillon*, 403.

² *West St. Louis Savings Bank v.* ³ 7 Cranch, 299.

⁴ *Russel v. Reece*, 2 Car. & Kir. 669.

pointed"; and the party making the acknowledgment was described in the same words. But the agreement was signed "Zina Pitcher, Mayor of Detroit," without any other addition. It was argued that a disclosure of the agency should have been made by an addition to the signature, as well as by description in the body of the instrument. It was, however, held that the corporation was liable.¹ A written instrument was in the following words: "April 6, 1842. Due J. Duffield on settlement, the sum of 239 dollars in full for the joiner's work of the New Washington Seminary." Signed, "J. M. R. T. F. R., Building Comm., in behalf of the Trustees of the New Washington Seminary." It was held that no suit on the foregoing could be maintained against the parties signing it, because it did not contain any acknowledgment by them individually; that, if they were authorized by the trustees to execute it, the suit should be against the trustees.² Cases frequently arise

¹ *Detroit v. Jackson*, 1 Doug. Mich. 106. In this case, the court in holding that the agreement sufficiently appeared to be that of the principal, said: "In determining whether an instrument executed by an agent contains the obligation of the principal, we are to look to the whole instrument. The particular form of execution is not material if it be substantially done in the name of the principal. In this case the plaintiffs in error are fully described in the body of the agreement for submission as the contracting party. The submission is directly asserted to be theirs; the name of the agent is given as the instrument through whom the act is done. The agent does not purport to act for, or in any manner to bind himself personally. On the contrary, the body of the instrument fully shows that he is the mere agent, and that the submission is the submission of the plaintiffs in error. . . . We entertain no doubt as to what is the

proper construction of the agreement for submission in this case. We think the plaintiffs in error must be regarded as the contracting parties, although their agent has signed his own name to it without adding the name of his principals."

² *McHenry v. Duffield*, 7 Blackf. 41. A contract made in the name of J. D., "president of the New York Banking Company," was held binding on the company. *Boisgerard v. N. Y. Banking Co.*, 2 Sandf. Ch. 23. Where the president was authorized by the board of directors to make a call for payment on subscriptions for stock, and he made the call as president alone, it was held that as he was acting as the agent of the board under express authority, his action must be deemed that of the board. *City of Memphis v. Memphis Gas Co.*, 9 Heisk. 531. The president of a glass company having made a promissory note in the name of the company for fuel used by the

in relation to liability on promissory notes where it is sought to charge agents, the question being the intention of the parties to whom the credit was in reality given, and for whose benefit the notes were made. A few examples will serve to illustrate the rule of construction previously stated. Where the defendant, being agent of a corporation, gave a note, "I promise," etc., and signed it "A. B., agent of," etc., naming the corporation, SWIFT, C. J., said: "When an agent duly authorized subscribes an engagement in such manner as to manifest an intent not to bind himself, but to bind the principal; and when, by his subscription, he has actually bound the principal, then it is clear that the contract cannot be binding on him personally. It will be agreed that no precise form of words is required to be used in the signature; that every word must have an effect if possible; and that the intention must be collected from the whole instrument taken together. Who can entertain a doubt upon reading the note in question that it was the intent of the defendant to bind the company and not himself? . . . This mode of signing the note will fairly admit of this construction: I, as agent of the company, pledge their credit, or give their promise to pay the note; or the company, by me as their agent, promise to pay it. But if we consider the word agent as merely *descriptio personæ*, we give it no operation, and really expunge it from the writing. We are bound, however, to give effect to every word if possible; and the only way to give this word any effect is to make the note binding on the company."¹ A promissory

company in the manufacture of glass, it was held that the company was liable. *Mott v. Hicks*, 1 Cowen, 513. See *Shotwell v. McKown*, 2 South. 828. The secretary of a corporation who, as such, signs a lottery ticket for the company, is not personally liable to the holder. *Passmore agst. Mott*, 2 Binney, 201.

¹*Hovey v. Magill*, 2 Conn. 680. An action was brought on the following promissory note: "On demand, for value received, we promise to Nathaniel Palmer one thousand dollars on interest," signed, "G. Stevens, W. G. S." The plaintiff proved that the note and the signatures were all in the handwriting of William G. Stevens, the de-

note commencing, "On the first of January next I promise to pay," and signed "Alvin A. McWhorter, President W. & Coosa R.R. Company," was held binding on the company.¹ Under a statute providing that the notes of a bank should be countersigned by the cashier, a note on which was written "countersigned, C. Seymour," was held good, it not being necessary to its validity that he should add to his name his official character.² A note given for a premium of insurance was indorsed as follows: "By authority from J. D., I hereby guaranty the payment of this note. J. C." Another note was indorsed thus: "By authority from J. D., in a letter dated Sept. 24th, 1824, I hereby guaranty his payment of the premium on policy No. 10079. J. C." It was held that J. D. was liable as guarantor of the notes.³ The secretary of a corporation gave a prom-

fendant, whose initials were signed to the note. The defense was that the note was given for G. Stevens and Sons, who alone were liable, and that it was signed by the defendant with his initials as their clerk. A verdict having been rendered for the defendant, the court, on a motion for a new trial, said: "If the defendant, by placing his initials under the name of G. Stevens, intended to bind himself as a maker of the note, there can be no doubt as to his liability in that character, and this was a point to be considered and decided by a jury. But the initials might have been written and so might the full name, to attest the execution of the note by the one who was the maker, or to indicate that the one who wrote the initials had, as agent of the person whose name appeared as maker, executed the note for him and in his name. These are supposable cases, but they present questions on which the jury should have passed." *Palmer v. Stevens*, 1 *Davies*, 471. "A familiar instance of the manner of exe-

cuting a contract by an agent," said the Supreme Court of Michigan in an early case, "is found in the case of bank bills. They are upon their face the promises of the corporation by which they were issued; but they are signed by the president and cashier with an abbreviation, showing only the capacity in which they sign. It has never been contended that because these agents did not add to their signatures the name of the corporation, they were personally bound, and not the corporation. Where a check was drawn by the cashier of a bank, and it appeared doubtful whether it was an official or private act, parol evidence has been admitted to show that it was an official act for the purpose of making the bank responsible." *Detroit v. Jackson*, *supra*.

¹ *McWhorter v. Lewis*, 4 *Ala.* 198.

² *Bank of Utica v. Magher*, 18 *Johns.* 342.

³ *New England Marine Ins. Co. v. De Wolf*, 8 *Pick.* 56.

issory note as follows: "Ninety days after date, we promise to pay," etc., signed by him as secretary without other addition. In the left-hand corner was an impression of a seal, with the words, "Neal Manufacturing Company, Madison, Ind." It was held that the corporation was bound.¹ A promissory note was indorsed "W. Earle, Sec'y." The only names on the note were those of the maker, of the payees, bearing a corporate name, and of the party styling himself secretary. It was held that the intention was quite as apparent that the indorsement was for and in behalf of the payees, as if it had designated them by their corporate name.² An action was brought by the payee against the maker of three promissory notes in the following form: "I, the subscriber, Treasurer of the Dorchester Turnpike Corporation, promise," etc., signed "Gardner L. Chandler, Treasurer of the Dorchester Turnpike Corporation." It was urged on the trial that the notes were given for a debt due from the corporation to the payee, and that the treasurer had been authorized and requested to settle with the creditors by note or otherwise. The court said that it could not be doubted that the corporation was itself liable, the consideration having moved wholly from it, and it being apparent that the plaintiff did not, at the time of receiving the notes, look to the defendant's personal security.³ A promissory note payable to a corporation was indorsed thus: "Without recourse. Joel Scott, Secretary." It was held that the indorsement was sufficient to transfer the legal title to the note, and authorize the holder to fill it up so as to show that the assignment was made in behalf of the corporation.⁴

¹ Means v. Swormstedt, 32 Ind. 87.

² Nicholas v. Oliver, 36 N. H. 218.

³ Mann v. Chandler, 9 Mass. 335.

⁴ McIntire v. Preston, 10 Ill. (5 Gilman) 48. Where a promissory note, having been purchased by a bank from the holder, was indorsed by him, "Pay to E. Olcott, cashier, or order," it was

held a legal transfer of the note to the bank. Watervliet Bank v. White, 1 Denio, 608. A promise in a note to an insurance company upon the issuing of a policy to the maker, "Pay to the company, or to their treasurer," is not a promise to two distinct parties in the alternative, but a contract with and a

A promissory note held by a mutual insurance company was indorsed "L. Gregory, President." It was proved that the company had been accustomed to indorse commercial paper in this manner, and it did not appear that indorsements had ever been made in any other form. It was held the indorsement of the company, and not of the president individually.¹ In an action on a promissory note signed by the defendants as "Trustees of the First Baptist Society of Brockport," it was held, on demurrer, that *prima facie* the defendants were personally liable, but that such presumed liability might be rebutted by proof that the note was in fact given by the makers as agents of a corporation for a debt due from it to the payee, and that they were duly authorized to make such note as the agents of the corporation.² A bill of exchange drawn at the office of a corporation for its indebtedness, signed by the president, with the addition of "Prest. T. N. Co.," which was his title of office abbreviated, and directing that it be charged to "motive power and account," was held to show on its face an intention to bind the corporation, and not the signer personally.³ An action was brought by the indorsee against three persons as acceptors of a bill of exchange drawn on "E. M. and others, trustees of Clarence Hall, Liverpool," and accepted thus: "Accepted. E. M." The three defendants, with E. M. and another, were the five trustees of a body of persons associated for the purpose of building the hall, and E. M. was authorized by all of the trustees to accept the bill on their behalf. It was held that the defendants were bound by the acceptance, notwithstanding it

promise to the company; the intention of the words "or their treasurer" merely introducing a stipulation that the payment agreed to be made to the company shall be considered as thus made, if made to the person who may then

be their treasurer. *Atlantic Mut. Fire Ins. Co. v. Young*, 38 N. H. 451.

¹ *Elwell v. Dodge*, 33 Barb. 336. See *Scott v. Johnson*, 5 Bosw. 213; *Merchants' Bank v. McColl*, 6 Ib. 473.

² *Brockway v. Allen*, 17 Wend. 40.

³ *Olcott v. Tioga R.R. Co.*, 27 N.Y. 546.

did not show on its face that E. M. intended to accept, not individually, but for himself and four others.¹

Where a draft is drawn upon an individual and he accepts it as an officer of a corporation, he may show, in an action against him upon the acceptance, that he acted as the duly authorized agent of the corporation, and that the plaintiff knew the fact when he took the draft. For this purpose, there must be evidence establishing the liability of the corporation on the draft. Mere parol proof that the defendant had, in the opinion of the witnesses, authority to bind the corporation, would not be sufficient.² In an action by the payee against the acceptor of a bill of exchange drawn and accepted by "Gilbert Shearer, President of the Selma and Tennessee Railroad Company," the plaintiff having given in evidence the bill of exchange, with the acceptance thereon, the defendant offered to prove that the bill was drawn for a debt which the company owed the drawer, and that the holder of the bill at the time the same was drawn, was apprised by the drawer that it was intended to be drawn on the defendant as president of the company, and not in his private capacity. This evidence was admitted under objection, and a verdict having been rendered for the

¹ *Jenkins v. Morris*, 16 M. & W. 877. A draft which did not name the principal excepting "and charge the same to the Swanzy Paper Company. Yours respectfully, Joseph Hooper, Agent," was held to be the draft of the company. *Tripp v. Swanzy Paper Co.*, 13 Pick. 291. The same was held with reference to a draft, with the words "Pompton Iron Works" printed in the margin, and concluding, "which place to account of Pompton Iron Works. W. Burt, Agent." *Fuller v. Hooper*, 3 Gray, 334. A draft which concluded, "and charge the same to account of Proprietors Pembroke Iron Works. Your humble servant, Joseph Barrell,"

was held to bind him only. *Bank of British North Am. v. Hooper*, 5 Gray, 567. But where a draft with the words "Office Agent," *BIGELOW*, C. J., said: "No one can doubt that, on bills thus drawn, the agent fully discloses his principal, and that the drawer could not be personally chargeable thereon." *Slawson v. Loring*, 5 Allen, 340. A bank check, with the words "Ætna Mills" in the margin, and signed "J. D. Farnsworth, Treasurer," was held binding on the bank, and not on the treasurer personally. *Carpenter v. Farnsworth*, 106 Mass. 561.

² *Bruce v. Lord*, 1 Hilton, 247, *DALY*, J., dissenting.

defendant, the ruling of the judge at the trial was sustained.¹ Drafts were signed by W., with the addition of the abbreviated words, "Prest. T. N. Co.," made payable to his order, and indorsed by him. It was proved that W. was at the time president of the corporation; that in his capacity as such, he drew the drafts for the benefit of the company; that the company received the proceeds; and that afterward it recognized its liability by giving its bond as collateral.

¹ *Lazarus v. Shearer*, 2 Ala. 718. Where a bill of exchange was signed, "John Kean, President Elizabethtown & Somerville R.R. Co.," it was held that there was nothing on the face of the instrument itself to determine whether it was an individual or a corporate obligation, and that parol evidence was admissible to explain the ambiguity. GREEN, C. J.: "It cannot be said that this evidence will either contradict or vary the terms of the instrument. The whole difficulty lies, not in the construction of the instrument, but in the import of the signature. That signature, as we have seen, may import either the act of the company, or of the individual. The terms of the instrument are neither varied nor contradicted by proof that it was the contract of the one or of the other. The question is, not what is the true construction of the language of the contracting party, but who is the contracting party—whose language is it? And the evidence is not adduced to discharge the agent from a personal liability which he has assumed, but to prove that in fact he never incurred that liability. Not to aid in the construction of the instrument, but to prove whose instrument it is. Now, it is true that the construction of a written contract is a question of law to be settled by the court upon the terms of the instrument. But whether the contract was, in point of fact, executed, when it

was made, where it was made, upon what consideration it was made, and by whom it was made, are questions of fact to be settled by a jury, and are provable, in many instances, by parol, though even the proof conflicts with the language of the instrument itself. Thus, it may be shown that the contract, in fact, was made at a different place, at another time, and upon other considerations, than those stated upon its face. So, if an instrument purports to be executed by A. and B., it may be shown by parol that it was executed by A. alone, and that B. signed it merely as a witness, or for some other purpose. So, it may be shown that a note purporting to be drawn by A., and indorsed by B., is in fact the joint note of A. and B. So, where, in cases like the present, an individual, upon the face of the instrument, is deemed *prima facie* to have subscribed it as a contracting party, it has been held competent for him to prove that he signed it as an agent, or as a witness, or for some other lawful purpose." *Kean v. Davis*, 1 Zab. 683. A check having been drawn by the cashier of the Mechanics' Bank upon the Bank of Columbia, and an action brought on it by the latter against the former, the court said: "The question is, whether a certain act done by the cashier of a bank was done in his official or individual capacity. Had the draft drawn by Paton borne no marks of an official character

It was held that the instruments were the drafts of the company.¹

§ 114. Liability of agent on written instrument.—An agent who acts for himself, or without authority from the corporation, though professing to act as its agent and in its behalf, is personally liable.² A bill of exchange was directed

upon the face of it, the case would have presented more difficulty. But as marks of an official character not only exist on the face, but predominate, the case is really a very familiar one. Evidence to fix its true character becomes indispensable. It is enough for the purposes of the defendant to establish that there existed on the face of the paper circumstances from which it might reasonably be inferred that it was either the one or the other. In that case, it becomes indispensable to resort to extrinsic evidence to remove the doubt." *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326.

¹ *Thompson v. Tioga R.R. Co.*, 36 Barb. 79. See *Babcock v. Beman*, 11 N. Y. 200; *Bank of Genesee v. Patchin Bank*, 19 Id. 312.

² *Haynes v. Hunnewell*, 42 Me. 276. If trustees of a turnpike road, canal, or any other public work, act beyond the scope of their public powers, and order works to be done for which there is no fund, they may be personally liable to the parties who advance money to defray the expenses of such works; that would always depend upon the circumstances of each particular case. *Wilson v. Goodman*, 4 Hare, 54, per SHADWELL, V. C.; *Higgins v. Livingstone*, 4 Dow. P. C. 341. The makers of a promissory note are *prima facie* personally liable, although they sign their names as trustees of a religious society. But it may be shown that the note was in fact given by the makers as agents of the society, duly authorized to do so, for a precedent debt of the society.

Brockway v. Allen, 17 Wend. 40. It having been claimed, in an action on a promissory note against an individual, that, in making the note, he was acting as a trustee and agent of a corporation, it was held that the defense was defective in not alleging that he had authority to bind the corporation by his act, and that it had the faculty of becoming bound for the payment of money. *Harwood v. Humes*, 9 Ala. 659. Where the act of incorporation provides that if any director shall assent to the contracting of debts to a greater amount than a prescribed limit, he shall be personally liable for the excess. Such liability is not incurred by the giving of new notes for old ones, the actual indebtedness of the corporation not being thereby increased. *Nat. Bank v. Page*, 52 Vt. 452. If it is doubtful on the face of a check, drawn by the cashier of a bank, whether it was an official or a private transaction, parol evidence is admissible to show its nature. *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326. S. indorsed and transferred to a bank a note as collateral security for a loan then made by the bank to him. This note having become due, the makers supposing that S. still held the note, applied to him for a renewal and extension for a year, which he agreed to give if they would pay more than legal interest. They having consented to this, a new note was executed by them for the principal and interest then due on the old one, and another note for the excess of interest agreed on. Each of

to "Mr. James Diamond, purser, West Downs Mining Company." The acceptance was "James Diamond, accepted *per proc.*, West Downs Mining Company." Though a member of the company, he was not in fact authorized to accept bills in its behalf. It was held that he was personally liable. PARKE, B.: "The bill is drawn on him individually, and he accepts it for the company of which he is a member. He is not the less bound because he accepts it for himself and others. He was not compelled to include the others; they are not bound, but he is. Now, if he were agent for the company, and that company consisted of himself and five others, then he had the power to bind himself as principal and the others as agent. But if he had no authority to bind the five, then he alone is bound as the drawee, being made liable by what he has signed in his own name. He cannot be agent for himself, and therefore he binds himself as principal."¹ A bill of exchange was drawn on a person as an individual. The consideration stated was for "machinery supplied to the Hayter and Holne Moor Mines." The acceptance was in these words: "Accepted for the companies. William Charles, Purser." It was held that he was personally liable as acceptor. CROMPTON, J.: "When parties put their own names on bills, and do not intend to become personally liable, they ought to use some words to show their intention. Here, the words 'for the companies,' are at best ambiguous, and we ought to construe them so as to render the bills valid instruments."²

the new notes bore legal interest. S. then exchanged with the bank, for the note it held as collateral, the note which the makers had executed to take it up, indorsing to the bank the new note to be held by it as collateral security for the loan, instead of the old note which the bank, in consideration thereof, delivered to S., who surrendered it to the makers. The bank had no knowledge

of the agreement between S. and the makers. It was held S. was not an agent of the bank in the usurious transactions. *First Nat. Bank v. Bentley*, 27 Minn. 87.

¹ *Nicholls v. Diamond*, 23 L. J. N. S. Exch. 1; 24 Eng. L. & Eq. 403.

² *Mare v. Charles*, 5 Ell. & B. 978; 34 Eng. L. & Eq. 138.

B. entered into a charter party, describing himself as agent for and in behalf of the owners of the vessel. Most of the covenants were expressed to be made by him as agent for the owners, but they were nowhere named in the instrument. The charter party concluded that, for the performance of all the covenants before mentioned, "the said parties respectively bind themselves personally to each other." It was held that B. was personally liable on the covenants.¹ Where a bond recited, "We, A., B., C., D., and E., trustees of the Methodist Episcopal Church of," etc., "our successors and assigns, are held," etc., "we bind ourselves, our and each of our heirs, executors, administrators, jointly and severally," etc.; and the bond was signed by them individually, and a seal annexed to each name, it was held that the obligors were personally liable.² The parties to an agreement to submit their differences to referees, were the proprietors of a certain township individually named on the one side, and R. and A. as owners of the W. Mills on the other. The agreement recited that the referees were to consider "the claims of said proprietors and of said mill company, although other persons besides these parties may be or may have been proprietors or members of said company, and the parties to the agreement severally agree to be accountable therefor." Although

¹ Meyer v. Barker, 6 Binney, 228.

² Dayton v. Warne, 43 N. J. 659. BEASLEY, C. J.: "That this is the English rule, appears to be evidenced by a uniform train of decisions, beginning with Combes', reported by Coke, 9 Rep. 75, down to the recent case of Furnivall v. Coombes, 5 Man. & Gr. 736. This last case is strikingly indicative of the strength of the rule above asserted, and is closely in point with respect to the language creating the personal obligation. The indenture in that case related to the doing of repairs on a parish church, and the de-

fendants covenanted 'for themselves and their successors, church-wardens and overseers of the said parish and their assigns.' After this covenant thus expressed, there was a proviso to the effect that nothing in this instrument should be construed as imposing any personal covenant or obligation upon the persons executing. But the court held that as a personal obligation was clearly created in the obligatory part of the bond, the proviso was void on the ground of repugnancy, and held the defendants individually liable."

R. and A. were owners of the mills, yet the agreement showed that others were interested as stockholders. It was signed by R. and W., attorneys to the mill company, and by J. S., attorney to the township proprietors. In an action against the mill company on the award of the referees, it was held that the company, not being a party to the agreement of submission, was not liable.¹ In a lease, C. was described as "Treasurer of the Eagle Lodge," and the lease signed "C., Treas." Held that C. was liable.² A promissory note, by which A. B., as president of a corporation, promises to pay a specified sum, is not the note of the corporation, but of A. B.³ Where a promissory note was signed by a person in his own name, with the addition of the words "Secretary Auburn Masonic Female College," it was held that *prima facie* he was personally liable.⁴ A promissory note containing a stamp or impression of a seal in the form of a circle, having within it the words, "Second Presbyterian Church, Po'keepsie, 1835," and signed by three of the trustees of the society, was held the personal undertaking of the signers.⁵ A promissory note was signed, "David Hoyt, Agent for the Churchman"; the Churchman being a newspaper establishment of that name. It was held that the words, "Agent for the Churchman," were mere words of description, and the signer alone liable.⁶ The same was held in relation to a draft drawn upon a person individually, and accepted by him under the designation of "Treasurer Nuevitas M. Co."⁷ A joint and several promissory note was signed by parties, with the words added, "Trustees of Union Religious Society, Phelps." It was held that they were personally liable.⁸ But in such case, the makers

¹ Sawyer v. Winnegance Mill Co., 26 Me. 122.

² Seaver v. Coburn, 10 Cush. 324.

³ Barker v. Mechanics' Fire Ins. Co., 3 Wend. 94.

⁴ Drake v. Flewellen, 33 Ala. 106.

⁵ Farmers' & Manufacturers' Bank v. Haight, 3 Hill, 493.

⁶ De Witt v. Walton, 9 N. Y. (5 Seld.) 571.

⁷ Bruce v. Lord, 1 Hilton, 247.

⁸ Hills v. Bannister, 8 Cowen, 31.

may relieve themselves of liability by showing that the note was in fact given by them as the agents of a corporation for a debt of the corporation due to the payee, and that they were authorized to make the note as the agents of the corporation.¹ In a lease under seal, given "for agricultural fair purposes," the lessees were described as president, vice-president, secretary, treasurer, and directors, "being the board of managers of the Garrattsville Agricultural Society and Farmers' Club." The lease was to the parties of the second part, and their successors in office, and the instrument was severally signed and sealed by the parties. It was held that on the face of the contract, the signers were personally liable; but that it was a question for the jury, on proof of the circumstances attending its execution, whether the parties executed it, supposing it to be the contract of the association, and if they so found, the signers were not liable. BOCKES, J., dissenting, maintained that there was an ambiguity on the face of the instrument as to the character in which the lessees were acting, and that parol evidence was admissible to show the real position of the parties in the transaction.²

If the right of the agent is sought to be derived solely from its exercise with the knowledge and approval of the corporation, it must be regarded as limited to the description of cases in which it has been exercised, and which serve to prove its existence, and not to extend to cases dissimilar in their character. Where the corporation has sold land subject to conditions, authority conferred upon the agent to give notice to occupants, and take possession of buildings which have been erected in violation of the conditions, and hold them for the corporation, does not authorize him to make a lease of the premises in order that

¹ Brockway v. Allen, 17 Wend. 40. na Trading Co., 11 Serg. & Rawle, 179.
See Sterling v. Marietta & Susquehan-

² Whitford v. Laidler, 25 Hun, 136.

the lessee may bring ejectment to try the title; such a power not being incidental to an authority to enter and hold.¹

§ 115. **Liability of principal for fraud of agent.**—A corporation is liable for the fraud of its agent committed in the course of his employment, in the same manner that an individual is responsible for the acts of his agent touching the business of the principal.² A lady having a large sum of money in a bank on the security of a deposit note, the manager of the bank proposed to her that she should purchase certain real estate for a sum which would extinguish a mortgage on it held by a third person, and also a lien held by the bank. To this she assented, and surrendered to him her deposit note, for which he gave her a new deposit note for the difference between the amount of the former note and the purchase money, retaining the balance for the purpose of making the investment. This money the manager appropriated to his own use. It was held that the bank was liable to refund the amount.³ Where a principal employs several agents to transact jointly a particular business, he is equally responsible for the conduct of each and all of them while acting within the limit and scope of their power—as completely so as he would be for the conduct of a single agent upon whom the whole authority had been conferred. He cannot shift or avoid this responsibility by the multiplication of his agents. It is also clear that

¹ Gillis v. Bailey, 17 N. H. 18.

² Chestnut Hill v. Rutter, 4 Serg. & Rawle, 6; Bank of Ky. v. Schuylkill Bank, Parsons' Sel. Cas. 180; Life & Fire Ins. Co. v. Mech. Fire Ins. Co., 7 Wend. 31; Lubricating Oil Co. v. Standard Oil Co., 49 Hun, 153; Reed v. Home Savings Bank, 130 Mass. 443. "There can be no doubt," said Lord CRANWORTH, "that if the agents employed conduct themselves fraudu-

lently, so that if they had been acting for private employers, the persons for whom they were acting would have been affected by their fraud, the same principle must prevail where the principal under whom the agent acts is a corporation." Ranger v. Great Western R.R. Co., 5 House of Lds. Cas. 86.

³ Thompson v. Bell, 26 Eng. L. & Eq. 536.

the corresponding responsibility of each of the several joint agents to the principal for the faithful discharge of their duties, is as complete and perfect as in the case of a simple agency ; and any prejudice to the principal arising from fraud, would afford ground for redress from the party guilty of the wrong. One of the grounds for charging the principal with the knowledge possessed by the agent, is because the latter is bound to communicate the fact to the former, and is liable for any prejudice that may arise from a neglect in this respect ; and hence, the law presumes that the principal has had actual notice. The duty of any one of the joint agents is as obligatory upon him in this respect as if he had possessed the sole power in the matter of the agency, and any prejudice resulting from the neglect would afford a like redress.¹ A person, as agent for a corporation, accepted a bill of exchange for an object within the scope of his agency, thereby rendering the corporation liable on his acceptance. The indorsees claimed the right to maintain an action against the agent personally, on the ground that he procured the bill to be discounted on his private account, and not for the corporation, and that he appropriated the avails, which was the fact. It was held that the corporation was alone liable.² The secretary and manager of a corporation, who was a defaulter, having borrowed money ostensibly in behalf of the corporation, which he had no right to do, and appropriated the same, it was held that the corporation was liable.³ Where the board of directors of a bank having authorized the president to borrow money for the use of the bank, he fraudulently drew a draft in favor of a person by whom it was indorsed to the plaintiff, who received it in the usual course of business, without notice of the fraud, it was held that the plaintiff's right to recover was not af-

¹ Bank of U. S. v. Davis, 2 Hill, 451. wards, 74 Ga. 220; Fouche v. Brower, Ib. 251.

² Shelton v. Darling, 2 Conn. 435. ³ Leonard v. Burlington Mu. Loan Assoc., 55 Iowa, 594.
See Cotton States Life Ins. Co. v. Ed-

fectured by the fraud of the drawer and indorser.¹ The president of a bank having agreed with the plaintiff to take his United States 7-30 notes, and exchange them for 5-20 bonds, the president converted the notes to his own use, and the plaintiff sued the bank for their value. It was urged in defense, that the transaction was with the president individually, and not with the bank; but it was held otherwise, and that the bank was liable.² Where the directors of a joint stock company, in a transaction in behalf of the company with third parties, induce the latter to enter into a contract with them, of which the company avails itself, the company will be bound, although the fraud consists of false statements made by the directors to the company at the annual meeting, upon which such parties rely.³ When the agent, in committing the fraud, acted in relation to a transaction foreign to his agency, no liability will, of course, be incurred by the corporation therefor. The fact that the cashier of a bank used U. S. bonds of the denomination of five hundred dollars each, left at the bank for safe keeping, as a special deposit, and replaced them with bonds of the denomination of one thousand dollars each, there being no evidence that the bank either received any benefit from, or had anything to do with the alteration, was held not a conversion of the first-named bonds by the bank.⁴ A party, instead of delivering his money to the receiving teller of a bank, handed it from time to time to the bank's bookkeeper, to deposit it for him. The bookkeeper kept part of the money, but by false entries in the dealer's pass-book, and in the books of the bank, concealed the abstraction from both. Sometimes, during a pressure of business, the bookkeeper assisted the receiving teller, and

¹ Ridgway v. Farmers' Bank, 12 Serg. & Rawle, 256.

² Van Leuven v. First Nat. Bank, 54 N. Y. 671.

³ Nat. Exchange Co. v. Drew, 32 Eng. L. & Eq. 1.

⁴ Whitney v. First Nat. Bank of Brattleboro, 50 Vt. 388. See Foster v. Essex Bank, 17 Mass. 479.

sometimes supplied his place in his absence, but none of the money in controversy was delivered to him on those occasions. It was held that the bookkeeper, in receiving these moneys, was the agent of the party, and not of the bank, and that the bank was not liable for that portion which did not come to the hands of the receiving teller, or of the person temporarily supplying his place in the bank, or which did not otherwise come into the coffers of the bank.¹ An agent, however broadly his authority may be expressed, has no authority to act for himself, or make a contract in which he acts directly for himself, and also as agent of the company.² A., having made a note in blank, handed it to B., a bank director, for him to insert in it a specified sum, and use it to renew a note of A. for the same amount, held by the bank. B. filled up the blank for a much larger sum, and presented the note to the bank to be discounted for his own use, which was done, B. sitting as one of the board of directors when the note was taken by the bank, and not disclosing the foregoing facts to any other director. It was held that A., the maker of the note, was liable to the bank. In respect to paper discounted for B.'s benefit, his attitude in relation to the bank was changed, he then becoming a borrower, and the directors who gave him accommodation could not be affected by a constructive notice of any fact which he individually possessed.³ One of the directors of a bank, who was authorized, when money was abundant, to solicit and procure notes for discount, obtained possession of a note, under pretence of getting it discounted for the maker, at a time when money was scarce, and pledged it to the bank for a loan made to himself, and a prior debt due by him, the maker knowing that the director was authorized by the

¹ *Manhattan Co. v. Lydig*, 4 Johns. 377.

² *Bentley v. Columbia Ins. Co.*, 19 Pick. 595.

³ *Terrell v. Branch Bank of Mobile*, 12 Ala. 502. And see *Lucas v. Bank of Darien*, 2 Stew. Ala. 321.

bank to procure notes for discount only when money was abundant. It was held that as the director had exceeded his authority in the transaction, the bank was not bound by his fraudulent conduct, and that as he did not act in his capacity of director, the note was recoverable of the maker.¹

When a person, in making a contract, acts as the agent of both parties, the contract is voidable in equity, at the election of the principal. Upon timely application and proof, the court will presume that the contract was injurious, and consequently fraudulent, unless it be shown that the principal, having all the knowledge the agent possessed, gave him previous authority to act as he did. This, however, is a mere rule of equity, the contract not being void, but only voidable. The rule is applicable to all persons placed in situations of trust or confidence, with reference to the subject matter of the contract, and embraces trustees, executors, administrators, guardians, agents, and factors.²

§ 116. **Liability of agent for fraud committed by him.**—It is scarcely necessary to say that an agent who commits fraud, thereby makes himself personally liable; as authority derived from a principal cannot be predicated upon such a transaction.³ In a case of that kind, the directors of the corporation will not incur personal liability for loss occasioned by the fraud, unless they knew the agent was unworthy of trust.⁴ Where the president and treasurer of a bank purchased State stocks to carry on their private undertaking, and signed a contract that the bank would pay for the same, which they proceeded to do with money taken by them from the bank, it was held that they were personally liable for the amount thus taken.⁵ By the charter of a railroad

¹ *Washington Bank v. Lewis*, 22 85; *Atty. Genl. v. Corp. of Leicester*, Pick. 24. 7 Beav. 176.

² *N. Y. Cent. Ins. Co. v. Nat. Protection Ins. Co.*, 20 Barb. 468. ⁴ *Scott v. Depeyster*, 1 Edw. Ch. 513.

³ *Dodgson's Case*, 3 De Gex & S. ⁵ *Austin v. Daniels*, 4 Denio, 299.

company, its capital stock was limited to \$300,000, to be divided into \$100 shares each. The whole capital was subscribed and paid in, and certificates of stock issued representing the thirty thousand shares actually subscribed and paid for. The by-laws provided that transfers of stock should be made on the books of the company upon the surrender of the certificate of ownership, and a new certificate be issued. The president of the company, who was its transfer agent, in charge of its office and transfer books, and authorized and accustomed to transfer stock, fraudulently issued a certificate to a person for a large number of shares, he in fact not owning any stock, and none standing in his name on the books. The plaintiffs in good faith, and having no reason to suppose that the certificate was not genuine, but relying upon it as valid, made a loan to the holder, receiving from him the certificate with an assignment and power of attorney to transfer the stock. It was held that the plaintiffs did not acquire a right to any stock, and that the corporation was not liable to them for loss incurred by loaning money upon the faith of the certificate.¹ A president of a bank in charge of its business, with the cashier subject to his directions, permitted money to be drawn from the bank by an irresponsible person who gave no security, for an object in which the president was interested, requesting the cashier to say nothing about the transaction to the directors. It was held that the president was personally liable to the bank, and could claim nothing on account of the cashier's knowledge.²

An act of incorporation imposes no duties on the directors simply as individuals, but on a majority acting as a board. If any one of them improperly obtain and dispose of the funds or property of the corporation, they are liable as

¹ *Mechanics' Bank v. N. Y. & New Haven R.R. Co.*, 13 N. Y. (3 Kernan) 599. See *N. Y. & New Haven R.R. Co. v. Schuyler*, 17 N. Y. (3 Smith) 592; 34 Ib. 30.

² *First Nat. Bk. v. Reed*, 36 Mich. 263.

individuals, and not jointly as directors.¹ Directors may be rendered personally liable for a fraudulent breach of trust, or gross negligence, or a faithless misappropriation of the trust fund placed in their hands; or the fund itself may be followed into the hands of any one who is not an innocent purchaser, or an innocent recipient of the same, for a valuable consideration.² The directors of a corporation having speculated in stocks, which was unauthorized by the charter, and done to subserve their private interests, it was held that they were individually bound to make good the loss.³ Where the directors of a corporation, by executing a mortgage, secured to themselves advantages which were not common to all the stockholders, it was held that they had violated a plain principle of equity applicable to trustees.⁴ The directors of an incorporated company are liable in equity as trustees for a fraudulent breach of trust. The primary party to sue in such case is the corporation, it being the party injured. But if the corporation refuses to sue, the stockholders may sue in their individual names.⁵ Where the agents of a corporation have obtained fraudulent judgments against it, and on them made a fraudulent sale of its franchises, it is a wrong primarily committed against the corporation, and no corporator can assume its right to obtain redress until the corporation has been found incapable of doing it, or has improperly or collusively refused to do so.⁶ If a member of a corporation knows that the company is engaged in illegal transactions, and acquiesces in the same by participating in the results, he cannot hold the directors personally liable for a loss thereby occurring.⁷

¹ Franklin Ins. Co. v. Jenkins, 3 Wend. 130.

² Gratz v. Redd, 4 B. Mon. 178; Gindrat v. Dane, 4 Cliff C. C. 260.

³ Robinson v. Smith, 3 Paige Ch. 222.

⁴ Koehler v. Black River Falls Co., 2 Black. 715.

⁵ Brinckerhoff v. Bostwick, 88 N. Y. 52; Hodges v. New England Screw Co.,

1 R. I. 312, per GREENE, C. J., citing Charitable Corp. v. Sutton, 2 Atk. 404; Atty. Genl. v. Utica Ins. Co., 2 Johns. Ch. 359; Robinson v. Smith, *supra*; Cunningham v. Pell, 5 Ib. 607.

⁶ See Bayless v. Orne, 1 Freem. Ch. 161; Hersey v. Veazie, 24 Me. 9.

⁷ Scott v. Depeyster, 1 Edw. Ch. 513.

The officers of a corporation, authorized to issue certificates to stockholders as evidence of title to stock, are liable, not only to the immediate purchaser of spurious stock falsely and fraudulently certified by them, but also to any subsequent purchaser buying upon the faith of the false certificate.¹

§ 117. **Liability of principal for misrepresentations of agent.**—So completely is the principal represented by the agent while acting within the scope of his authority and employment, that third parties, for most purposes, are regarded as dealing with the principal himself. In the case of a contract, it is deemed the contract of the principal, and if the agent, at the time of the contract, make any representation or declaration touching the subject matter, it is the representation or declaration of the principal.² In seeking to enforce

¹ Shotwell v. Mali, 38 Barb. 445. In this case, GROVER, J., said: "A vendor guilty of fraud in the sale of property is liable only to his vendee, and a subsequent purchaser does not acquire the right of action. The same rule applies in case of a sale with warranty, and a breach. There is not only no privity, but no fraud practiced or contract made with the subsequent purchaser. It is also true that the purchaser of the stock had a remedy against his vendor for a breach of the implied warranty of title. But does such right of action constitute a bar to an action against one who had induced the purchase by a fraudulent representation that the vendor had title to the stock where damage resulted from the fraud? Clearly not. That is but the common case of frauds committed in transactions between other parties. And it is no answer to the action that the guilty party obtained no advantage from the fraud, or that some remedy, in some form, exists against another party." See Cazeaux v. Mali, 25 Barb. 578; Seizer v. Mali, 32 Ib. 76.

² Bank of U. S. v. Davis, 2 Hill, 451, per NELSON, C. J. Where an agent innocently makes a misrepresentation of facts while making a contract for his principal, it will not amount to fraud on the part of the latter, if the principal, though aware of the real state of facts, was not cognizant of the misrepresentation, nor directed the agent to make it. Kelly v. Troy Ins. Co., 3 Wisc. 254. The proposition, without qualification, that principals are bound only by the authorized acts of their agents, except where the agent has been apparently clothed with authority beyond that actually conferred, is too broad. In a leading case on the subject, where an agent authorized to sell a quantity of silk had made certain fraudulent representations by which the purchaser was deceived, the principal was held liable. Lord HOLT said: "Seeing somebody must be a loser by this deceit, it is more reasonable that he that employs and puts a confidence in the deceiver should be a loser than a stranger." Hern v. Nichols, 1 Salk. 289.

contracts entered into by agents, the principal is subject to have them impeached by any conduct of his agent which would have that effect if proceeding from himself. Every species of fraud, misrepresentation, or concealment, therefore, in the agent affects the principal's right to recover.¹ The principal of a mining company demanded the performance of a contract, recognizing the authority of the agent in procuring it, but denying that the company could be affected by his false and fraudulent representations. This denial rested on the alleged ground that the agent possessed limited powers, and was restricted by his principal for making any representations, true or false, on the subject of the contract. It was held that the principal could not give validity to the contract by repudiating the fraudulent practices of his agent in obtaining it.²

Where the authority of an agent depends upon some fact outside the terms of his power, and which from its nature rests particularly within his knowledge, the principal is bound by the representation of the agent, although false, as to the existence of such fact.³ In other words: "Where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith pursuant to the apparent power, may rely

¹ It is not a defense to an assessment upon stock that the agent of the corporation who procured the subscription exhibited to the defendant a list of subscribers for stock, some of whom were persons in whose judgment defendant had confidence, and that relying upon the representations of the agent that those persons had subscribed for stock which was not true, the defendant was induced to subscribe. *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286. Where the

officers of a corporation, which has become a stockholder in another corporation, falsely represent the financial condition of the latter, the former is not thereby made liable as a member of the latter. *Langan v. Iowa & Minn. Constr. Co.*, 49 Iowa, 317.

² *Crump v. U. S. Mining Co.*, 7 Gratt. 352.

³ *Griswold v. Haven*, 25 N. Y. 595, per SELDEN, J. *Contra*, *Mechanics' Bank v. Schuyler*, 13 N.Y. (3 Kern.) 599.

upon the representation, and the principal is estopped from denying its truth to his prejudice."¹ If a person be empowered by an insurance company to solicit and receive risks of insurance, to receive applications from others for such insurance, and to receive premiums and premium notes therefor, he is thereby constituted a general agent of the company for the transaction of that particular kind of business, and the company will be bound by his fraudulent representations in procuring insurances and premium notes.²

Although a cashier in a bank ordinarily has no power to discharge a debtor of the bank without payment, or to bind the bank by an agreement that a surety shall not be called to pay a note he has signed, or that he will have no further trouble from it, yet if the cashier, on being inquired of by a surety, informs him that a note held by the bank has been paid, and the surety is thereby induced to give up securi-

¹ N. Y. & New Haven R.R. Co. v. Schuyler, 34 N. Y. 30, per DAVIS, J.

² Devendorf v. Beardsley, 23 Barb. 656. JAMES, J.: "In this case, the agent was not specially authorized with limited instructions to induce the defendant to take a policy of insurance in the company and give his premium note therefor. His powers were more extensive. He was furnished with a roving commission to solicit policies, premiums, and premium notes. It was a particular department of business connected with said corporation, wherein he was authorized to act without special instructions; and in the absence of such instructions to the contrary, the right to use the ordinary means and inducements to accomplish the end is implied. Where a person is engaged in a particular department of business, and is employed to do an act within his line, with special instructions, there the general powers derivable from the

nature of his ordinary employment will control the limitation; he will be held to possess such general powers in the particular instance as his ordinary occupation fairly imports to the public; but in the absence of any such implication of general power, the limitation will control. This case is clearly within such rule. The public knew nothing of the company for whom the agent was seeking insurance risks, and what more natural than that those solicited to take policies should desire to know something of the character, capital, and means of the corporation before becoming members; and of whom could inquiry be made, and who more likely to know, than the agent? The corporation was bound to anticipate that such inquiries would be made, and to know that the agent, whether general or special, bound the principal by his answers and representations in reply thereto."

ties, the bank will be estopped to deny that the note has been paid.¹ The cashier of a bank wrote to S. & Co., the plaintiffs, offering to sell them a bill of exchange drawn by A. & Co. S. & Co. replied by mail, accepting the offer, and at the same time forwarded the money in payment, which the cashier received. The cashier thereupon inclosed to the plaintiffs a bill drawn by B. & Co., with whom the plaintiffs were not acquainted, indorsed without recourse by D., a stranger to the plaintiffs; the cashier at the same time stating to them that the A. & Co. bill was gone, but that the bill sent was "perfectly safe." The plaintiffs wrote in answer: "Your favor of the 4th instant, with stated inclosure, is received, and is very satisfactory." The bill proving not collectible, it was held that the bank was liable.²

§ 118. **Liability of agent for false representations.**—The following rule was applied in the case of representations made by a director of an incorporated insurance company, in published statements and reports as to its financial condition: that an action founded upon deceit and fraud could not be maintained, in the absence of proof that the defendant believed, or had reason to believe, at the time he made the statements, that the representations made by him were false, or that he assumed, or intended to convey the impression that he had actual knowledge of their truth, though well aware that he had no such knowledge.³ Where the

¹ *Cocheco Nat. Bank v. Haskell*, 51 N. H. 116.

² *Sturges v. Bank of Circleville*, 11 Ohio St. 153.

³ *Mayer v. Amidon*, 45 N. Y. 169; *Oberlander v. Speiss*, *Ib.* 175; *Wakeman v. Dalley*, 51 N. Y. 27; *Arthur v. Griswold*, 55 Id. 400; *Fusz v. Spaunhorst*, 67 Mo. 256. In *Henderson v. Lacon*, L. R. 5, Eq. 249, *WARD, V. C.*, laid it down distinctly that if the directors made a false representation which was material, knowing it to be

false, and thereby deceived a person, they were answerable for such misrepresentation, and liable for the consequences. An action cannot be maintained against a director, who, with other directors, through the articles of association under which a bank was organized, misrepresented the amount of stock actually subscribed and paid in, whereby the plaintiff was induced to become a stockholder. *Mabey v. Adams*, 3 Bosw. 346.

directors of an insurance company, availing themselves of their official position, individually made, and concurred in the making and publishing by the president and secretary of the company, a statement that the affairs of the company were in a sound and prosperous condition, knowing it to be false, and intending to deceive and defraud all property holders who might be induced thereby to insure their property in that company, it was held that they were personally liable.¹ Notwithstanding the directors, by misrepresenting the condition of the corporation, caused larger dividends to be paid than should have been done, the shareholders, as a body, cannot compel the directors to repay such dividends.²

§ 119. **Liability of corporation for the torts of its agents.**—Although a body politic, in its corporate capacity, cannot commit a crime, or perpetrate a felony, yet since such an institution is governed by the intellectual agency of natural persons, they may cause it so far to depart from the purposes of its establishment, as by means of its servants to commit a trespass or a tort, or unlawfully to refuse to make compensation for that by which it has been, upon its own request, materially benefited.³ Therefore, for acts done by the agents of a corporation *in delicto*, as well as *in contractu*, in the course of its business and in their employ-

¹ *Salmon v. Richardson*, 30 Conn. 360.

² *Turquand v. Marshall*, L. R. 4, Ch. 376. The payment by the cashier of a bank of overdrafts on the checks of depositors, in the absence of a good excuse, constitutes a violation of duty. *Bank of St. Mary's v. Calder*, 3 Strobb. 403. Where the president of a manufacturing corporation made a note under the seal of the corporation, payable to his own clerk, for his indebtedness to certain persons, under the pretence that the corporation owed him a much

larger debt, it was held that the giving of such a note was not evidence that anything was due from the company to himself, so as to authorize such a transfer. *Bonaffe v. Fowler*, 7 Paige Ch. 576.

³ *McKim v. Odom*, 3 Bland Ch. 421; *Hay v. Cohoes Co.*, 3 Barb. 42; *Watson v. Bennett*, 12 Id. 196; *Lyman v. White Bridge Co.*, 2 Aiken Vt. 255; *Goodloe v. Cincinnati*, 4 Ohio, 500; *Nat. Bank v. Graham*, 100 U. S. 699; *Balt., etc., R.R. Co. v. Fifth Baptist Church*, 108 Id. 317.

ment, the corporation is as responsible as an individual would be under similar circumstances.¹ The general rule is, that every principal is liable to third persons in a civil suit, for the frauds, deceits, concealments, misrepresentations, torts, negligences, or other malfeasances and omissions of duty of his agent in the course of his employment, although the principal did not justify, participate in, or at the time know of such misconduct.² Where a corporation has exerted its power under an unconstitutional statute to the injury of others, its agents are trespassers, and the corporation which caused the act to be done is liable for the injury.³

In a case in which it was held that an action for malicious prosecution would lie against an incorporated banking institution, it was urged that the remedy for the injury should be sought against the directors of the bank, or the individuals, whoever they might have been, by whose agency the malicious suit was prosecuted, and not against the corporation; that a corporation, from its very nature, could not entertain malice, and that no presumption could arise from the relation of the directors to the bank that the malicious action was authorized by the corporation; that the directors of a bank are its agents, deriving their powers from its charter, and for a wilful and malicious act done by them in excess of their powers thus derived, the corporation could not be rendered liable. To this the court replied that in all the cases wherein it had been held that corporations might be subjected to civil liabilities for torts, the acts charged as such had been the acts of their constituted

¹ *Smith v. Birmingham Gaslight Co.*, 1 Adol. & El. 526; *Maund v. Monmouthshire Canal Co.*, 1 Car. & M. 606; *Humes v. Knoxville*, 1 Humph. 403; *Whiteman v. Wilmington & Susq. R.R. Co.*, 2 Harr. Del. 514; *Underwood v. Newport Lyceum*, 5 B. Mon. 129; *Moore v. Fitchburg R.R.*

Corp., 4 Gray, 465; *Alexander v. Relfe*, 74 Mo. 495.

² *McDougald v. Bellamy*, 18 Ga. 411; *Fishkill Savings Inst. v. Nat. Bank of Fishkill*, 80 N.Y. 162; 36 Am. Rep. 595.

³ *Hamilton County v. Cincinnati, etc., Turnpike Co.*, *Wright*, Ohio, 603.

authorities, either the directors, agents, or servants employed.¹ "It may seem severe to impose upon innocent stockholders damages for the tortious acts of the directors of the corporation when it must be conceded that such acts are in excess of their authority. But it is no more so in fact than to render any other principal liable for the wrongs of his agent committed while in the exercise of his employment. It should be remembered that the stockholders select from their number the directors, and intrust to their management the business of the corporation, and consequently assume the risk of loss from their misconduct; and it should also be remembered that it is a rule of law that if one of two innocent persons must suffer loss by the act of a third, he who put it in the power of the third person to do such act should be compelled to sustain the loss occasioned by its commission. The directors are the chosen representatives of the corporation. What they do within the scope of the objects and purposes of the corporation, the corporation does. If they do an injury to another, even though it necessarily involves in its commission a malicious intent, the corporation must be deemed by imputation to be guilty of the wrong, and answerable for it as an individual would be in such a case."² In an action against a railroad company for false imprisonment, the plaintiff's evidence showed that he, having traveled on defendants' line with a return ticket, at the termination of the return journey surrendered to the ticket collector the return half of another ticket which had then expired, and which he had put in his pocket by mistake for the right one. The ticket collector thereupon took him to the ticket office, where he explained his mistake. Thence the collector took him to the company's inspector of police at the

¹ *Goodspeed v. East Haddam Bank*, 22 Conn. 525. It was held that a railroad company was liable for a malicious prosecution instituted by its agents.

Ricord v. Centr. Pacific R.R. Co., 15 Nevada, 167.

² *Maynard v. Firemen's Fund Ins. Co.*, 34 Cal. 48, per CURREY, C. J.

station, and the collector and inspector took him to the office of the superintendent of the line, who, refusing to accept plaintiff's explanation, said to the inspector: "I think you had better take him, but first you had better obtain the concurrence of the secretary." The inspector thereupon left and returned shortly afterward (but whether or not he obtained the secretary's concurrence did not appear), and directed a police constable in the pay of the company to take the plaintiff before a magistrate on the charge, who dismissed the complaint. It was held that the conduct of the company's agent in referring to the superintendent as superior authority, was admissible in evidence to show that he was authorized to act for the company in arresting the plaintiff.¹

But a corporation is not liable for false imprisonment, or any other wilful trespass of its agent, neither authorized nor ratified.² The act of New York providing that the owner of a steamboat shall be deemed responsible for the good conduct of the master employed by him, is no more than a declaration of the rule at common law, and is only applicable to the master's conduct *as master*, and not to his conduct when he goes beyond the scope of his authority by committing a wilful trespass or other wrong. In an action against a corporation for an injury, occasioned by the wilful act of the captain in charge of the defendant's boat, it was held that the corporation was not liable therefor, although the wrong was authorized and approved by its president and general agent.³ Beyond the scope of his employment, the agent is as much a stranger to his principal as any third person, and the act of the agent, not done in the execution of the service for which he was engaged,

¹ Goff v. Gt. Northern R.R. Co., 3 Ell. & Ell. 672.

² Mitchell v. Rockland, 41 Me. 363; Am. Express Co. v. Patterson, 73 Ind. 430.

³ Richmond Turnpike Co. v. Vanderbilt, 1 Hill, 480; 2 Comst. 479;

Thomson v. Sixpenny Savings Bank, 5 Bosw. 293.

cannot be regarded as the act of the principal. Whether the service to be rendered by the principal is in the performance of a contract, or in the discharge of any other duty resting on him, makes no difference; the question being in either case whether the act is within the scope of the agent's express or implied authority in respect to the principal's service. A person, after procuring a railroad ticket, requested the agent of the company to check his baggage, but by his overbearing conduct and abusive language, provoked the agent to strike him with a hatchet. It was held that the wrongful act of the agent in striking the complainant could not be regarded as authorized by the company, nor as an act done by the agent in the execution of the service for which he was engaged; and that the fact that the blow was inflicted with a hatchet furnished by the company, to be used for a wholly different purpose, though in connection with the agent's business, was immaterial as respected the liability of the company.¹

§ 120. Liability of corporation for negligence of its agents.—A corporation is liable for the negligence of its agents while engaged in the business of the agency to the same extent and under the same circumstances that a natural person is chargeable.² When a bank receives upon good considera-

¹ Little Miami R.R. Co. v. Wetmore, 19 Ohio St. 110.

² New York & New Haven R.R. Co. v. Schuyler, 34 N. Y. 30. If third persons are injured by the neglect of an agent to discharge a duty, their action must be brought against the principal. Denny v. Manhattan Co., 2 Denio, 115; S. C. 5 Ib. 639. It is upon the liability of the corporation, rather than upon that of the treasurer, the stockholders must rely to enforce the payment of their dividends in a case where no other ground exists for charging the treasurer but his nonfeasance; in accordance with the rule that a servant

cannot be charged by third persons for mere neglect of duty, but resort must in such case be had to the principal. French v. Fuller, 23 Pick. 108. At common law, where an agency exists, the principal becomes responsible for the acts of his agent, because he has the right to employ, and the authority to control him. Where the right of employment and the authority to control are both wanting, no agency can exist; for the acts of the agent cannot in such a case become the acts of the principal. New York v. Bailey, 2 Denio, 453.

tion a note or bill for collection at the place where such bank carries on business, it is liable for the neglect, omission, or other misconduct of its agents, either in the negotiation, collection, or paying over of the money, by which the money is lost, or other injury sustained by the owner of the note or bill, unless there is some agreement to the contrary express or implied.¹ A draft was drawn by the Empire Mills, a corporation, upon E. C. Hamilton. It was accepted, "Empire Mills, payable at the American Exchange Bank, by E. C. Hamilton, Treasurer." It was held that as the acceptance did not bind either the drawer or drawee, and the bank neglected to protest the bill, the bank was liable to the holder.² The cashier of a national bank agreed with the plaintiff, for a sufficient consideration, to exchange her bonds, then in the care of the bank, for registered bonds. This was not done, and several months afterward the bonds were stolen. In an action to recover their value, it was held that the bank was liable.³ An action was brought to recover the value of certain railroad bonds which the plaintiff deposited for safe keeping in a bank organized under the national banking act,⁴ and which were lost, after remaining in the bank two years, the plaintiff during that time occasionally taking them out, cutting off the coupons, and returning them to the bank. It ap-

¹ *Allen v. Merchants' Bank of N. Y.*, 22 Wend. 215; *Com. Bank of Pa. v. Union Bank of N. Y.*, 11 N. Y. (1 Kern.) 203. To render a bank liable for the neglect of its officer, it must appear that the officer was the agent of the bank in the particular transaction that is complained of. *Thatcher v. Bank of State of N. Y.*, 5 Sandf. 121. Where bank notes, carelessly left by the officers of the bank in an unfinished state, are stolen, and the president's name forged to them, the bank is not bound to pay them. *Salem Bank v. Gloucester Bank*, 17 Mass. 1.

² *Walker v. Bank of State of N. Y.*, 9 N. Y. (5 Seld.) 582. When a promissory note or bill of exchange is received by a bank in the usual course of business for collection, and the bank at the proper time delivers it to the notary generally employed by it to transact such business, in order that there may be demand, protest, and notice, the bank will not be liable for loss caused by the failure of the notary to do his duty. *Citizens' Bank of Balt. v. Howell*, 8 Md. 530.

³ *Yerkes v. Nat. Bank*, 69 N. Y. 382.

⁴ *Laws of U. S. of 1864*, ch. 106.

peared that the bonds were left by the plaintiff at the bank with the teller, who was the son of the cashier, and sometimes acted as cashier in the absence of his father; that the cashier had the sole management and control of the affairs of the bank; that some of the persons who left valuables in the bank for safe keeping were directors; and that the teller was in the habit of receiving special deposits at the bank, with the knowledge and consent of his father, the cashier. There was evidence tending to show that if the plaintiff's bonds were stolen, the theft was committed in the daytime, during banking hours; that the safe in which the bonds were kept, was so situated as to be accessible to a person entering from the street; that at times the safe was not in view of the officers in charge of the bank, and the door of the safe left open; and that a thief might have entered from the street, and finding the safe open, abstracted the package without being observed by any one in the room. It was held that the bank was responsible for the bonds, and bound to return them when demanded, or show good reason for not doing so.¹ If there be no fraud or

¹ *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82. In this case the court reviewed some of the principal decisions on the subject, and commented upon them substantially as follows: "In *Foster v. Essex Bank*, 17 Mass. 479, where special deposit had been made with the defendant of a cask containing gold coin, it was shown that it had been the practice of the bank to receive special deposits of money and other valuable things, but there was no regulation, by-law, or provision of the charter on the subject. It was claimed by the plaintiff that the banks had been in the habit of receiving such deposits from the earliest period; that the Bank of England had no express power to do so, but it had become a part of its duty or business by usage, and be-

longed to the very nature of such institutions. On the other side it was denied that the bank had any such power, or that it was incidental to the business of a bank; that the authority could not be inferred from usage, and the repetition of unauthorized acts by the officers could not give them validity, and the officers only were bound. It was held that the practice of the bank having been to receive such deposits, it must be deemed the depository, and not the cashier or other officer through whose particular agency the property had been received. In *Lloyd v. West Branch Bank*, 15 Pa. St. 172, it was determined that the power to receive deposits conferred on the bank by the banking law of Pennsylvania, referred to deposits of current money

collusion, a bank, and not the transferee of its stock, will be answerable for loss sustained by an act of the proper officer of the bank arising either from a misconception of

received as such, and not to special deposits. But the court did not hold that if a bank is in the habit of receiving on deposit coin or other valuables, such as are usually the subject of special deposits in banks, it would not be bound by the acts of its officers in receiving them. In *Lancaster Co. Nat. Bank v. Smith*, 62 Pa. St. 47, where a special deposit of United States bonds had been made with the bank by delivering them to the teller, and the teller had afterward delivered them to a third party supposed to be the depositor, but without ascertaining his identity, the bank was held liable. The power of the bank to bind itself by receiving the deposit was not disputed, and it was held that it was a question for the jury whether the bank had been guilty of gross negligence. In *Scott v. Nat. Bank of Chester Valley*, 72 Pa. St. 471, a special deposit of bonds for safe keeping had been made with the defendant by one of its customers, and the bonds were stolen by the teller of the bank, but no negligence on the part of the bank was established, and a verdict on that ground was sustained. The receipt of the bonds was not claimed to be *ultra vires*. In *First Nat. Bank of Carlisle v. Graham*, 79 Pa. St. 106, the plaintiff brought a suit to recover for the loss of United States bonds claimed to have been deposited by her with the bank, and she relied upon a receipt for the bonds, signed by the cashier of the bank, in which he acknowledged that she had left the bonds in the bank for safe keeping. It was admitted that government bonds were received by the bank for safe keeping with the knowledge of the president, cashier, and teller, and with-

out compensation. A verdict and judgment having been rendered for the plaintiff, it was reversed on exceptions to rulings on questions of evidence, and to some portions of the charge in submitting to the jury the question of negligence; but on the point of the liability of the bank the doctrine of *Foster v. Essex Bank* was reiterated. *Turner v. First Nat. Bank of Keokuk*, 26 Iowa, 562, recognized the liability of a national bank for a special deposit of bonds. In *Smith v. First Nat. Bank of Westfield*, 99 Mass. 605, where there was a special deposit of bonds with a national bank, the bank was held to be bailee of the bonds, but liable only for want of ordinary care. And see *Giblin v. McMullin*, L. R. 2, P. C. 317. In *Chattahoochee Nat. Bank v. Schley*, 58 Ga. 369, the court, after referring to the previous decisions, held that by habitually receiving through its cashier special deposits to be kept gratuitously for mere accommodation, a national bank will incur liability for gross negligence in respect to any such deposits received in the usual way. In *Wiley v. First Nat. Bank*, 47 Vt. 546, and 50 Id. 389, it was held that when a special deposit is received by a national bank even in accordance with usage, and with the knowledge and acquiescence of the directors of a bank, the bank is not liable for its loss even by gross negligence; on the ground that the bank has no corporate capacity to receive such deposits for safe keeping, and therefore cannot empower any of its officers to incur liability in its behalf by so doing. Approved in *Third Nat. Bank of Baltimore v. Boyd*, 44 Md. 47, and in *First Nat. Bank v.*

his duty, or a want of judgment.¹ A national bank loaned to one C. twenty thousand dollars, payable on call, with interest, taking from him his memorandum of indebtedness for that sum, with, as collateral security therefor, what purported to be a certificate of two hundred shares of the stock of a railroad company. The certificate was originally for two shares of the stock, but fraudulently altered so as to purport to be a certificate for two hundred shares. The bank received the certificate in good faith, and without any suspicion that it was not genuine. Subsequently, upon payment by C. to the bank, he received back his memorandum of indebtedness, and the cashier of the bank returned to him the fraudulent certificate, with the usual form of transfer on the back. Afterward, one M. loaned to C. twenty-five thousand dollars on call, with interest, and received from C. in good faith the fraudulent certificate, the signature of the cashier being well known to M. Shortly afterward the fraudulent alteration of the certificate first became known to the bank and M. It was held that the bank was liable to M. for the loss sustained.² Where a corporate fund was deposited in a bank in such a manner as to give the officers of the bank reason to suppose that the deposit was made by the president of the bank, and was to be drawn out on his signature, and the officers of the bank afterward paid out the money on his check, supposing that he was authorized to withdraw it, it was held that the bank was not liable for the loss thereby sustained by the corpo-

Ocean Nat. Bank, 60 N. Y. 278. In the latter case the opinion proceeded upon the ground that the receiving of special deposits was not shown to be part of the ordinary business of the bank; that there was no evidence that the bank had been in the habit of receiving such deposits; that no authority of the cashier or assistant cashier to receive such deposits had been shown, and that whatever might be

the incidental powers of the corporation, the power of its officers to bind it can be presumed only to exist within the scope of its ordinary business, and their ordinary duties."

¹ *Hodges v. Planters' Bank*, 7 Gill & Johns. 306; *Albert v. Savings Bank of Balt.*, 1 Md. Ch. 407.

² *Mathews v. Mass. Nat. Bank*, 1 Holmes, 396.

ration.¹ Paper in packages was insured against loss during its transportation on a canal boat, and a portion having been laden on deck, and lost, the question was whether it was protected by the policy, which provided that the company should not be liable for loss or damage to goods or property on deck, unless by special agreement in writing indorsed on the policy. It appeared that the agents of the company, before the boat started, were told how the boat was loaded, and were requested to go and look at it. It was held that as the policy was in their possession, it was their duty to make the indorsement in proper form, so as to cover the risk, and, as they did not do it, the company must be deemed to have waived the condition.² A person expecting the arrival of goods by railroad, directed to his care, sent a cartman to the depot to get them. The latter, having paid the freight, and taken a receipt, asked the delivery agent for the goods, who said that they were not there, but had been already delivered. The cartman pointed out several packages which lay together by themselves, and asked if they were not the ones he was after, which in fact they were. The agent turned over one of the packages, and stated that they were not the goods inquired for, but came from a different place; and the cartman left them and went away. The delivery agent discovered his mistake a short time afterward, but sent no word to the owner, and the following night they were destroyed by fire. It was held that the agent, in declaring that the goods were not at the depot, but had been delivered, that the goods which were there came from another place, which was not true, in failing to examine the marks on the goods by the way-bill, and generally, in the hurried and superficial manner in which he made his examination, when a slight degree of care and attention would have as-

¹ *Fulton Bank v. N. Y. & Sharon Canal Co.*, 4 Paige Ch. 127.

² *Allen v. St. Louis Ins. Co.*, 85 N. Y. 473.

certained the truth, was chargeable with negligence, for which the railroad company was liable for the value of the goods lost.¹

The fact that the negligent act was done without the sanction of the corporation, or that its agents were carefully selected with reference to their competence, would not constitute a bar to an action. The disobedience of orders of an agent may be the very negligence which produces the mischief.² The same considerations of public policy demand that the law should be applied as rigidly to railroad companies as to any other species of passenger carriers. And it makes no difference as to the liability of the company for the injury of a person caused by the negligence of the company's servants, that he was traveling on the road without paying fare.³

There is no distinction between railroads and ordinary highways in regard to the degree of care which the law requires on the part of those who have the direction or management of vehicles upon them. By this, it is not meant to be understood that the same precautions or preventive measures are required or tolerated indiscriminately in all such cases.⁴ In an action against a railroad company for injury sustained by the plaintiff at a crossing, the defendants contended that they were only bound to exercise ordinary care, and they offered to show that they had used the same care that those having charge of engines usually exercised. The court held that this would not of itself amount to a justification in relation to the case, which the defendants were bound to exercise; but instructed the jury that the defendants were bound to exercise reasonable care

¹ *Stevens v. Boston & Maine R.R.*, 1 Gray, 277. See *Norway Plains Co. v. Boston & Me. R.R.*, *Ibid.* 263.

² When it is the duty of the directors of a corporation to do certain things which they neglect to do, and third persons thereby sustain injury, the cor-

poration will not be permitted to take advantage of the neglect. *Bargate v. Shortridge*, 31 Eng. L. & Eq. 46.

³ *Gillenwater v. Madison, etc., R.R. Co.*, 5 Ind. 339.

⁴ *Beers v. Housatonic R.R. Co.*, 19 Conn. 566.

and diligence in passing over crossings with their engines ; that if what was reasonable care at crossings had become established by usage, the care ordinarily observed would be the test of reasonable care ; but inasmuch as railroads were of recent introduction, and no such usage had become established, the jury would decide upon their own judgment, in view of all of the circumstances, and the explanatory evidence in the case, whether the defendant had exercised reasonable care.¹ In an action for injuries caused by fire communicated to the plaintiff's property by the locomotives of a railroad company, reasonable care and diligence were defined by the court to be : "having engines properly constructed and in good order, with suitable fixtures for preventing injuries by fire ; spark-catchers such as are known to the company to have been used and approved of, and such as are best calculated to prevent the emission of sparks, allowing at the same time a sufficient draft upon the fire to create steam enough for the purpose of propelling the engine at a proper speed ; such care and diligence in using the locomotive upon the road as would be exercised by skilful, prudent, and discreet persons, having the control of the engine, regarding their duty to the company, and having a proper desire to avoid injuring property along the road."²

The causes of delay which will excuse a carrier of goods from the performance of his duty to carry within the usual or ordinary period required for the transportation he undertakes, must be only those which occur without his fault, or the fault of his agents, servants, or employes. This rule is applicable to corporations ; for to say that the want of fidelity on the part of the servants of a corporation excuses it from the performance of any duty which it owes to a third person would be to practically exempt it from liability for any

¹Bradley v. Boston & Me. R.R., 2 ²Boston & Susq. R.R. Co. v. Wood-Cush. 539. See Memphis v. Lasser, 9 ruff, 4 Md. 242.
Humph. 757.

negligence, or any misfeasance, which was not the immediate or necessary consequence of a corporate act. Where, in consequence of the sudden refusal of nearly all of the engineers in the employ of a railroad company to run the trains, and in consequence of delay in transportation the plaintiff's goods were rendered nearly worthless, it was held that the company was liable for the loss.¹

A railroad company has been held liable to an employé for an injury caused by the negligence of other employés when he has no participation in the duties the neglect of which contributed to the injury complained of.² But where it appeared that one Farwell was employed by a railroad

¹ Blackstock v. N. Y. & Erie R.R. Co., 1 Bosw. 77. WOODRUFF, J.: "It cannot for a moment be claimed that a combination, resulting in a refusal to work by one hundred and forty out of one hundred and sixty-eight men of skill, whose services were indispensable to the conduct of the defendants' business, ought to have been foreseen, when there was no just cause for such a refusal; and it was probably impossible, by any ordinary means, to have supplied their places on the day on which their refusal took effect; indeed, on so short a notice as defendants received, it may be regarded as quite impossible. Nevertheless, we must regard the hazard of such an occurrence as resting upon the employers. They alone have it in their power to secure, by proper contracts, indemnity against the consequences of misconduct by the employé. The owner of goods has no control or right of interference in the matter, and we perceive no ground on which to relieve the defendants from the hazard to which the nature of their business, and the vast extent to which it involves the employment of assistants, necessarily subject them. And, although they are in a degree placed

within the power of extensive combinations among their servants, that, we think, furnishes no legal reason for visiting the consequence upon third persons. Practically, the defendants in such circumstances may suffer by the misconduct of their servants without redress, but the law imposes no hardship; on the contrary, it will hold the unfaithful servant liable for the direct and immediate consequences of his own fault, and this will, so far as the law can do so, give to the master indemnity. It ought not to be doubted, and probably would not be doubted, that if, by the negligence of a single engineer in charge of a train, or by his perverse refusal to perform his duty, his train was unnecessarily delayed, the company would be liable for the delay. When the delay is said to be excused if it happen without their fault, the term is not used as imputing personal blame, but it means without fault on their part, in their servants, or otherwise. If this be so, it is difficult to perceive how, in principle, the rule of liability is affected by increasing the number of servants who are guilty."

² Gillenwater v. Madison, etc., R.R. Co., 5 Ind. 339.

company as engineer on a passenger train, and Whitcomb, another servant of the company, who was in its employment as a switch tender, and well known to Farwell as faithful and trustworthy, carelessly left a switch in a wrong position as Farwell's train was passing, whereby the cars ran off the track, and Farwell injured, it was held that he had no right of action; that he contracted with reference to the risks of the employment; that he accordingly received compensation in wages for those risks; and that it would be contrary to public policy to permit a recovery the tendency of which would be to produce carelessness among servants and agents, to the danger of the public.¹ In Wisconsin, the statute makes railroad companies liable for damage sustained within the State by an agent or servant from another agent or servant, without contributory negligence on the part of the former; and, in case of death, the right of action is preserved to the personal representative of the deceased person.² It has been held in New York, that, where the act which a corporation employs an independent contractor to do is lawful as against the plaintiff, and the occurrence causing injury is not the necessary consequence of the contract, but results from want of care in doing the work, the corporation is not liable unless it retains the right to select, control, and direct the workmen; and the employment by it of a superintendent, engineer, or architect to see that the work is done properly, and in accordance with the contract, does not give him such control of the workmen as to render the corporation liable for their negligent acts.³

¹ Farwell v. Boston & Worcester R.R. Co., 4 Metc. 49. A corporation is not liable for the misconduct of its officers when performing duties for or between private individuals. In such cases, the whole duty of the corporation is performed when the selection is made, and having no interest in or

control over the performance of such services, no liability attaches. Dayton v. Pease, 4 Ohio St. 80.

² Rev. Sts. of Wis., secs. 1816, 4255; Gumz v. Chicago, etc., R.R. Co., 52 Wis. 672. See Pool v. same, 53 Id. 657.

³ Burmeister v. N. Y. Elevated R.R.

§ 121. **Liability of agents for negligence.**—By the civil law, “those who are named by companies and corporations to have the direction of their affairs, are obliged to take the same care and diligence as factors or agents. They are answerable, not only for any fraud and gross negligence which they may be guilty of, but also for all faults that are contrary to the care required of them.”¹ Directors must not only use good faith, but also care, attention, and circumspection in the affairs of the corporation, and particularly in the safe keeping and disbursement of funds committed to their custody and control. They must see that these funds are appropriated as intended to the purposes of the trust, and, if they misappropriate them, or allow others to divert them from these purposes, they will be personally liable.² Bank directors are not mere agents, like cashiers, tellers, and clerks, but trustees for the stockholders. They not only act for the bank, but, in a qualified sense, are the bank itself. “It is the duty of the board to exercise a general supervision over the affairs of the bank, and to direct and control the action of its subordinate officers in all important transactions. Their contract is not alone with the bank. They invite the public to deal with the corporation, and when any one accepts their invitation, he has the right to expect reasonable diligence and good faith at their hands; and, if they fail in either, they violate a duty they owe, not only to the stockholders, but to the creditors and patrons of the corporation.”³ But an action cannot be maintained by an individual holder of shares in an incorporated bank against the directors for acts of negligence and malfeasance in consequence of which the cap-

Co., 47 N. Y. Super. Ct. 264. See *Blake v. Ferris*, 5 Id. 48; *Peck v. Mayor, etc.*, 8 Id. 222; *Kelly v. Mayor, etc.*, 11 Id. 432; *Gardner v. Bennett*, 38 N. Y. Super. Ct. 197; *Clare v. Nat. City Bank*, 40 Id. 104; *Nat. Tube Works Co. v. Be-*

dell, 96 Pa. St. 175; *Keystone Bridge Co. v. Newberry*, *Id.* 246.

¹ *Domat*, book 2, tit. 3, sec. 2.

² *Shea v. Mabry*, 1 Lea. Tenn. 319.

³ *United Soc. of Shakers v. Underwood*, 9 Bush. 609.

ital of the bank has been wasted and lost, and the shares of the plaintiff rendered valueless; there being no legal privity between the holders of shares in a bank in their individual capacity on the one side, and the directors of the bank on the other. The stock and property of the bank are vested in it as a corporation, and to it all agents, debtors, officers, and servants are responsible. Although the stockholders ordinarily elect the directors, yet they do so as parts and members of the corporation, so that the directors are the appointees of the corporation, not of individuals.¹ The directors of a gas company were held liable for a nuisance created by the superintendent and engineer under a general authority to manage the works, though they were personally ignorant of the particular plan adopted, and though such plan was a departure from the original and understood method, which the directors had no reason to suppose had been discontinued.²

When it is usual and necessary for an agent to employ a sub-agent to transact the business, the agent will not ordinarily be responsible for the negligence or misconduct of the sub-agent if he has used reasonable diligence in his

¹ *Smith v. Hurd*, 12 Metc. 371; *Abbott v. Merriam*, 8 Cush. 588. "We forbear to say what degree of neglect and inattention in the directors and officers of incorporated companies in the duties for which they are appointed, and which they are understood to engage to perform to some reasonable extent toward the stockholders and the confiding public, will subject them to damages. That is a delicate point to settle, and not likely to be correctly determined upon the common notions which seem to prevail too generally among certain classes in the community. Thousands of innocent and confiding stockholders, as well as strangers dealing with such corporations, have

been utterly ruined by the inattention and negligence of the directors and officers, not to say by their flagrant mismanagement and fraud. The officers in our public and private institutions are solemnly pledged, by the acceptance of office, to the exercise of integrity and vigilance in discharging their trust, and, while the pledge is so often left unredeemed, it will do the community no harm for judges to hold the reins of accountability somewhat more tightly than they have been held for years past." *ELLSWORTH, J.*, in *Calhoun v. Richardson*, 30 Conn. 210. See *Lexington & Ohio R.R. Co. v. Bridges*, 7 B. Mon. 556.

² *Rex v. Medley*, 6 Car. & P. 292.

choice as to the skill and ability of the sub-agent.¹ Therefore when a bank, upon receiving a note for collection, places it in the hands of a notary, the bank will not be liable for the neglect of the notary; and it has been held that to rebut this *prima facie* exemption from liability, it is not sufficient to show that the notary was addicted to intoxication. If, however, the notary was not competent, by reason of his drunkenness, at the time the note was delivered to him, the bank would be liable; and that would be a question for the jury.² Although the general agent of a company is not liable for the bad debts, or for the negligence or faithlessness of agents whom he has necessarily employed, yet when it is his duty to see that the debts due the company are collected, he is bound to exer-

¹ Bank of Ky. v. Schuylkill Bank, Parsons' Sel. Cas. 180; Fabeus v. Mercantile Bank, 23 Pick. 332; Dorchester, etc., Bank v. New England Bank, 1 Cush. 177.

² Agricultural Bank v. Commercial Bank, 7 Smed. & Marsh. 592. See Tierman v. Commercial Bank of Natchez, 7 How. Miss. 648; Frazier v. New Orleans Gas Light, etc., Co., 2 Rob. La. 294; Baldwin v. Bank of La., 1 La. An. 13; Bellemire v. Bank of U. S., 4 Wheat. 105. In a case in New York, where a contrary view was taken, it was conceded that the collecting bank would not be liable for the default of the sub-agent, if there had been any understanding or agreement, express or implied, that the notes were to be transmitted to a sub-agent for collection. Allen v. Merchants' Bank, 22 Wend. 215. See Chickopee Bank v. Eager, 9 Metc. 584; Warren Bank v. Suffolk Bank, 10 Cush. 582. In Smedes v. Bank of Utica, 20 Johns. 372, where the bank was held liable by reason of its having employed a person to make demand and give the notice who was

not a competent agent, WOODWORTH, J., in delivering the opinion of the court, said: "If the note had been delivered to a notary, it would have presented a different case. Notaries are officers appointed by the State; confidence is placed in them by the government. This may be evidence sufficient to justify an agent in committing to them business relating to their offices, although in point of fact it might subsequently appear they did not possess the necessary qualifications." In Maryland, it has been held that "When, in the ordinary course of business, without any special agreement on the subject, a note or bill is received by a bank for collection, which is in due time delivered by it to the notary usually employed in such matters by the bank, so that the necessary demand, protest, and notices may be made and given by him, the bank will not be answerable in case of loss resulting from a failure of the notary to perform his duty." Citizens' Bank of Balt. v. Howell, 8 Md. 530.

cise ordinary diligence for that purpose.¹ If the drawer of a bill of exchange, made payable at a bank where he has no account and no money, and where there is a receiving as well as a paying teller, hands the amount to the paying teller, because, from his position in the bank, the bill will necessarily be presented to him for payment, the paying teller becomes the agent of the party who leaves the money with him, and the bank is not responsible for his conduct in relation to it.²

§ 122. Rule as to fiduciary relation.—It is a well-settled principle that a person having a duty to perform for others, cannot act in the same matter for his own benefit. The rule which prevents an agent or trustee from acting for himself in a matter where his interest would conflict with his duty, also prevents him from acting for another whose interest is adverse to that of the principal; and in all cases where, without the assent of the principal, the agent has assumed to act in such double capacity, the principal may avoid the transaction at his election. No question as to its fairness or unfairness can be raised. The law holds it constructively fraudulent, and voidable at the election of the principal.³ Such a transaction is voidable, not merely

¹ Williams v. Gregg, 2 Strobb. Eq. 297.

² Thatcher v. Bank of the State of New York, 5 Sandf. 121. In a suit by a bank, against which a judgment has been obtained by the owners of a note deposited in the bank for collection, for failure to give the indorser notice in proper time, brought against the cashier to recover the damages to which the bank has been subjected by his neglect of duty in the matter, it is error in the judge to charge that a recovery having been had against the bank in consequence of the mistake of the cashier after the day the note fell due, he was responsible to the bank which had been made liable by his neglect. The

judgment was evidence that there had been a recovery against the bank, and what amount of damages it had been compelled to pay; but not proof against the cashier for any other purpose. Whether the bank could charge the loss upon the cashier depended upon whether it could show that the mistake occurred through his culpable negligence. "That question should have been left to the jury, with the instruction that in deciding it, they should lay out of view the fact that a judgment had been recovered against the bank." Bank of Owego v. Babcock, 5 Hill, 152, per BRONSON, J.

³ U. S. Rolling Stock Co. v. Atlantic, etc., R.R. Co., 34 Ohio St. 450. See

for want of authority in the agent, but because the corporation itself, by whatever votes it may act, cannot do, assent to, or confirm it; the wrong to the individual shareholder being the same, whether committed with the concurrence, or subsequent approval and adoption of his associates controlling the corporation.¹

It follows from what has already been said, that an agent employed to purchase for another, cannot purchase for himself, whether he be actually or constructively an agent. He is in such case a trustee for his employer.² The prin-

Aberdeen R.R. Co. v. Blackie, 1 McQueen, H. L. Cas. 461; Bisham's Eq. 106; Buell v. Buckingham, 16 Iowa, 284; Brewster v. Hatch, 10 Abb. N. C. 400.

¹Brewer v. Boston Theatre, 104 Mass. 378, per WELLS, J. "When a corporation aggregate is formed, and the persons composing it, either by virtue of the compact, or by the express terms of the charter, place the management and control of its affairs in the hands of a select few, so that life and animation may be given to the body, then such directors become the agents and trustees of the corporation, and a relation is created, not between the stockholders and the body corporate, but between the stockholders and those directors who, in their character of trustees, become accountable for any wilful dereliction of duty, or violation of the trust reposed in them. I see no objection to the exercise of an equity power over such persons in the same manner as it would be exercised over any other trustees." MCCOUN, V. C., in Verplanck v. Merc. Ins. Co., 1 Edw. Ch. 84. But the right to avoid the contract because the agent has a personal interest in its subject matter adverse to that of the principal, or has assumed an incompatible duty, is one arising in equity for the protection of the principal. It was held that where

the same person was made the agent of two mining corporations in the same vicinity, and it became necessary for one to deal with the other, he must be presumed to have the same power to act for both that would be possessed if there were two agents, acting separately, and might dispose of property in the same way. The court said: "The authority of agents, where no law is violated, is as large as their employes choose to make it. There are multitudes of cases where the same person acts under power from different principals in their mutual transactions. Every partnership involves such double relation. Every survey of boundaries by a surveyor jointly agreed upon, would come within similar difficulties. There can be no presumption that the agent of two parties will deal unfairly with either." Adams Mining Co. v. Senter, 26 Mich. 73.

²Church v. Sterling, 16 Conn. 388; Cumberland Coal Co. v. Sherman, 30 Barb. 553. It is well settled that a trustee cannot, directly or indirectly, by himself, or through the agency of another, become the purchaser of the trust estate. Neither can he purchase an interest in property, and hold it for his own benefit, when in respect to such property he has a duty to perform inconsistent with the character of a purchaser on his own account. Van

ciple is not confined to a particular class of persons, such as guardians, trustees, or solicitors, but is a rule of universal application to all persons coming within it, which is, that no person can be permitted to purchase an interest where he has a duty to perform that is inconsistent with the character of purchaser.¹ The rule that an agent employed to sell cannot purchase the property himself, "stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private; but the value of the prohibition is most felt, and

Epps v. Van Epps, 9 Paige Ch. 237; Slade v. Van Vechten, 11 Ib. 21; Hawley v. Cramer, 4 Cowen, 717; Abbot v. Am. Hard Rubber Co., 33 Barb. 578. "This rule of restriction upon the powers of the trustee invalidates every indirect as it does every direct transfer to himself, or for his benefit; and the intervention of a third person as a means or channel by and through whom the title is transferred from the *cestui que trust*, and eventually vested in the trustee, will not uphold the transaction and sustain the title of the latter. Courts will look through the means to the end, and apply the proper remedy for the breach of trust. If the circumstances clearly show that the two transfers constitute but one transaction, they will be treated as parts of a single transaction, together perfecting a transfer from the trustee *qua* trustee to himself individually. When the thing transferred does not rest in the possession of the first transferee, but is immediately by him passed over to the trustee for his benefit, or to an association represented by him, in whole or in part, the law will hold it to be a transfer in violation of the trust. The rights of *cestuis que trust* require, in such cases, that the law should presume that the intermediate taker of

the property was but the agent and instrument of the trustee—a means of conveyance. The contrary of the presumption ought not to be proved, or even alleged. It would be unsafe to uphold a transfer under such circumstances, for want of express proof of the actual intent of the parties from the facts, or upon their oath, that the repurchase of the trustee was an afterthought. When the title remains in the immediate grantee but for a moment, or for a brief period of time, and is at once transferred to the trustee, or for his benefit, the presumption that the two transfers were only intended to effect the one object, that of conveying the property to or for the benefit of the trustee, is as strong as is the malicious intent to kill from the deliberate use of a deadly weapon. This rule of law which makes certain cases of presumption conclusive, merely attaches itself to the circumstances when proved; it is not deduced from them. It is not a rule of inference from testimony, but a rule of protection as expedient for the public good." Ib. per ALLEN, J.

¹ Greenlow v. King, 5 Lond. Jur. 18; Torrey v. Bank of Orleans, 9 Paige Ch. 649; S. C. 7 Hill, 260.

its application is more frequent, in the private relations in which the vendor and purchaser may stand toward each other. The disability to purchase is a consequence of that relation between them which imposes on the one a duty to protect the interests of the other, from the personal discharge of which duty, his own personal interests may withdraw him. In this conflict of interests the law wisely interposes. It acts, not on the possibility that, in some cases, the sense of that duty may prevail over the motives of self-interest; but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence and supersede that of duty. It therefore prohibits a party from purchasing on his own account that which his duty or trust requires him to sell on account of another, and from purchasing on account of another that which he sells on his own account. In effect, he is not allowed to unite the two opposite characters, of buyer and seller, because his interests, when he is the seller or buyer on his own account, are directly in conflict with those of the person on whose account he buys or sells.”¹ In *Aberdeen R.R. Co. v. Blaikie*,² the House of Lords, reversing the judgment of the court below, held that a contract entered into by a manufacturer for the supply of iron furnishings to a railroad company, of which he was a director, could not be enforced against the company. Lord CRANWORTH said: “Such an agent has duties to discharge of a fiduciary character toward his principal; and it is a rule of universal application, that no one having duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to

¹ WAYNE, J., in *Michoud v. Girod*, 4 How. 555, citing 2 Burge's Com. 459.

² *McQueen*, 461; H. L. Cas. 461.

be raised as to the fairness or unfairness of a contract so entered into. It obviously is or may be impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the *cestui que trust* which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt, or attempted to deal, with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person; they may even at the time have been better. But still, so inflexible is the rule, that no inquiry on that subject is permitted." Where the president of a corporation, who was also the agent of a third party, made a loan as agent to the corporation without consulting the directors or trustees, or his principal, and advanced a portion of the money thus obtained to himself in payment of a claim against the corporation for his salary as president, it was held that the transaction, which was ratified by a resolution of the board of trustees by his casting vote, was void, he being personally and directly interested.¹ The trustees of a corporation having passed a resolution to borrow money with which to pay the debts of the corporation, and to give a mortgage on its property to secure the loan, the mortgage to be executed by the president and secretary, the president bought the debts and assigned them to a firm of which he was a member, and executed the mortgage to the firm. In an action to foreclose, it was held that the transaction could not be upheld. "It was to the interest of the president, in purchasing the debts of the corporation,

¹ Chamberlain v. Pacific Wool Growing Co., 54 Cal. 103. A promissory note having been executed by the president and secretary of the company, and given to secure payment of an individual indebtedness of one of the directors of the company to the payee, it was held not the note of the corporation. Hall v. Auburn Turnpike Co.,

27 Cal. 255. It is improper for the president of a corporation to hold the positions of contractor to claim payment for work done in its behalf, and engineer to certify to the completion of the work, and that the amount claimed is due. Keeler v. Brooklyn Elevated R.R., 9 Abb. N. C. 166.

to buy them at as great a discount as possible. The greater the discount, the greater his gain. If he succeeded in purchasing the debts at any discount, to that extent he secured to himself an advantage not common to all of the stockholders."¹

A director of a corporation is the agent or trustee of the stockholders, and as such has duties to discharge of a fiduciary nature toward his principal, and is subject to the obligations and disabilities incident to that relation.² Directors cannot waive the provisions of a prohibitory statute forbidding them from participating in the benefits of a contract;³ nor can they, while directors, divest themselves of the knowledge they have acquired in confidence, of corporate affairs, or of the value of corporate property, nor be allowed to use it to their own advantage.⁴ "The directors of a railroad company are in an important sense regarded as trustees of the shareholders, and it would be a breach of duty to transfer that trust; to assume obligations inconsistent with that relation; to place themselves in opposition

¹ Davis v. Rock Creek, etc., Mining Co., 55 Cal. 359; 36 Am. Rep. 40. In the foregoing case, it did not appear whether or not the president of the corporation secured the demands at any discount. The court remarked that the law did not permit any inquiry into that question; but that occupying, as he did, the position of trustee, he should not have put himself in a position adverse to his *cestuis que trust*.

² Cumberland Coal Co. v. Sherman, 30 Barb. 553; Guild v. Parker, 43 N. J. 430; Clark v. San Francisco, 53 Cal. 306; Bank v. Downey, *Ib.* 466; Chouteau v. Allen, 70 Mo. 290.

³ Barton v. Port Jackson, etc., Plank Road Co., 17 Barb. 397.

⁴ Hoyle v. Plattsburgh & Montreal R.R. Co., 54 N. Y. 314; Cumberland Coal Co. v. Sherman, *supra*, and cases cited; Koehler v. Black River Falls

Iron Co., 2 Black. 715; European & North Am. R.R. Co. v. Poor, 59 Me. 277; Flint, etc., R.R. Co. v. Dewey, 14 Mich. 477; Alford v. Miller, 32 Conn. 543; Redmond v. Dickerson, 1 Stockt. Ch. (9 N. J. Eq.) 507; Gray v. N. Y. & Va. Steamship Co., 3 Hun, 383. A director cannot, with a view to share in the profits, rightfully become a member of an improvement company with which a railroad company has a contract to furnish the means with which to construct the road; and if any gains should be realized in the enterprise, they would belong to the railroad company; upon the equitable principle which forbids a person acting in a fiduciary capacity from speculating out of the subject of the trust. Gilman, etc., R.R. Co. v. Kelly, 77 Ill. 426.

to the interests of the stockholders, or in such position where their own individual interests would prevent them from acting for the best interest of those they represent. The rule is the same that applies to all persons acting in any fiduciary capacity that requires the utmost fidelity to the interest of the *cestui que trust*. The rule in its general sense embraces every relation in which there may by any possibility arise a conflict between the duty of the person with whom the trustee is dealing, or on whose account he is acting, and his own individual interest."¹ An agreement to control the action of the directors, and to cause them to agree by vote to pay the plaintiff's claim without reference to its legality, and regardless of their duty to the corporation or its creditors, would be void.² Although it is a general rule that a contract between a person sustaining a fiduciary relation and his fiduciary is not void but voidable, and that it is valid in equity as well as at law unless the fiduciary repudiates or complains of it, yet there may be a case where such a contract would be void *ab initio*.³ A contract entered into by the executive committee of the board of directors of a railroad company with A. and B., and assigned by the latter without consideration to a new company in which a majority of the stock was taken by six directors of the old company, was held fraudulent and void. The court remarked that all arrangements by the directors of a railroad company to secure an undue advantage to themselves at its expense by the formation of a new company as an auxiliary to the original one, with an understanding that they, or some of them, should take stock in it, and then that valuable contracts should be given

¹ Ryan v. Leavenworth, etc., R.R. Co., 21 Kans. 365.

² Bliss v. Matteson, 52 Barb. 335.

³ Twin Lick Oil Co. v. Marbury, 91 U. S. (1 Otto) 587. If a director, by means of his power as such, secures

to himself any advantage over other stockholders or creditors, equity will treat the transaction as void, or charge him as a trustee for the benefit of the injured party. Corbett v. Woodward, 5 Sawyer C. C. 403.

to it, in the profits of which they as stockholders in the new company were to share, amounted to so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and would be condemned whenever properly brought before the courts for consideration.¹ Where the officers and directors of an insolvent corporation made notes of the company in their own favor for its indebtedness to them, it was held a fraud in law, and that they thereby obtained no preference over the other creditors.² A director or stockholder may trade with, borrow money from, loan money to the corporation of which he is a member, take back a mortgage to secure the same, and be a purchaser at the foreclosure sale, provided the transaction is free from fraud and oppression, and for the interest of the company.³ A. entered into a

¹ Wardell v. R.R. Co., 103 U. S. (13 Otto) 651. See Thomas v. Brownsville, etc., R.R. Co., 1 McCrary C. C. 392. "Where the right is one which must stand, if at all, upon an express contract, and which does not arise by operation or implication of law, then he shall not hold it against the will of his *cestui que trust*; for, in the very bargain which gave rise to it, in which he should have kept in view the interest of the *cestui que trust*, there intervened before his eyes the opposing interest of himself. The vice which inheres in the judgment of a judge in his own cause, contaminates the contract; the mind of the director or trustee is the forum in which he and his *cestui que trust* are urging their rival claims, and when his opposing litigant appeals from the judgment there pronounced, that judgment must fall. It matters not that the contract seems a fair one. . . . Nor is it proper for one of a board of directors to support his contract with his company upon the ground that he abstained from participating as director

in the negotiations for, and final adoption of, the bargains by his co-directors. The very words in which he asserts his right, declare his wrong. He ought to have participated, and in the interest of the stockholders, and if he did not, and they have thereby suffered loss, of which they shall be the judges, he must restore the rights he has obtained; he must hold against them no advantage that he has got through neglect of his duty toward them. The application of the rule is most frequent in the relations between vendor and purchaser; but its reason and force extend to all agents and trustees, public and private. It has not always presented itself to the minds of judges in its full scope. At times they have been seduced into listening to suggestions that the circumstances of the special case showed the absence of fraud and overreaching." DIXON, J., in Stewart v. Lehigh Valley R.R. Co., 38 N. J. 505. See Buell v. Buckingham, *supra*.

² Hopkins' Appeal, 90 Pa. St. 69.

³ Harts v. Brown, 77 Ill. 226; Hart

contract with the president and a director of a railroad company, to construct and equip a portion of the road in consideration of stock and bonds of the company. Immediately afterward A. assigned the contract to the president of the company, who fulfilled it at a cost less than the par value of the stock and bonds paid him therefor, and less than their actual value. The contract and assignment were made with the knowledge and approval of all of the directors and stockholders as the only available means to insure the building of the road. It was held that an action brought by a receiver of the company against the president to recover the difference between the par value of the stock received by the latter, and the expense of performing the contract, could not be maintained.¹ A corporation having been created to facilitate the erection of a hotel, decided to mortgage the premises to raise the necessary funds for the purpose. A mortgage of the hotel lot and building was accordingly executed by the president and secretary of

ridge v. Rockwell, R. M. Charl. 260; Hallam v. Indianola Hotel Co., 56 Iowa, 178. "In some cases of corporations, as in mutual insurance companies, the main object of the act of incorporation is to enable the company to make contracts with its stockholders, or with persons who become stockholders by the very act of the contract of insurance. It is very true that, as a stockholder in making a contract of any kind with the corporation of which he is a member, is in some sense dealing with a creature of which he is a part, and holds a common interest with the others, who with him constitute the whole of that artificial entity, he is properly held to a larger measure of candor and good faith than if he were not a stockholder. So, when the lender is a director, charged with others with the control and management of the affairs of the

corporation, representing in this regard the aggregated interest of all the stockholders, his obligation, if he becomes a party to a contract with the company, to candor and fair dealing, is increased in the precise degree that his representative character has given him power and control derived from the confidence reposed in him by the stockholders who appointed him their agent. If he should be a sole director, or one of a smaller number vested with certain powers, this obligation would be still stronger, and his acts subject to a more severe scrutiny, and their validity determined by more rigid principles of morality and freedom from motives of selfishness. All this falls far short, however, of holding that no such contract can be made which will be valid." Twin Lick Oil Co. v. Marbury, *supra*, per MILLER, J.

¹ Van Cott v. Van Brunt, 82 N.Y. 535.

the corporation, pursuant to a vote of the board of directors, to carry into effect a proposition previously adopted by a vote of the shareholders at a meeting duly convened, and the bonds of the company, payable to bearer, with interest coupons attached, issued. It was held that the arrangement was not void because the directors, most of whom were owners of stock in the corporation, took the bonds and advanced the money.¹

Where the director's act consists not in possessing himself of the property of the corporation as owner, but in taking collateral security for a debt honestly due him, or a liability justly incurred, the rule forbidding him to deal on his own behalf in respect to any matter involving his fiduciary character, has no application, and the payment of the debt, or the discharge of the liability, is an essential prerequisite of the avoidance of the transaction.² With reference to the purchase of corporate property by a director of the corporation, it is laid down in some adjudged cases that such a purchase is absolutely void without regard to the good faith of the transaction, and the property belongs to the corporation the same as it did before such sale. The better opinion, however, is, that it is only to be avoided at the instance of some party in interest.³ A contract entered into by the directors of a corporation with a member of the board for the sale to him of a portion of its property, cannot be avoided by a new company which, by purchase of the property of the old company and reorganization, succeeds the latter.⁴

The president of a corporation which is embarrassed

¹ Hotel Co. v. Wade, 97 U. S. (7 Otto) 13.

² Duncomb v. N. Y., Housatonic, etc., R.R. Co., 84 N. Y. 190; Smith v. Lansing, 22 Ib. 520.

³ McDowell v. Ark. Mech. & Agl. Co., 38 Ark. 17.

⁴ Little Rock, etc., R.R. Co. v. Page,

35 Ark. 304. It has been held that the officers and directors of a railroad company may purchase the shares of stockholders at less than their par value, and sell them at an advance to another company which by obtaining a majority of the stock gets control of the railroad. Deaderick v. Wilson, 8 Baxter, Tenn. 108.

and without funds, may purchase its outstanding bond and hold it against the company.¹ Where an association, formed for the purpose, proposes to a railroad company which is heavily in debt to advance money to complete the road, the mere fact that one or more of the parties making the offer are members of the board of directors by whom it is accepted, does not render it void.² Directors are under no moral or legal obligation to advance their own money to pay the debts and preserve the property for the use of the other shareholders who have declined to join in making advances to relieve the corporation from debt. If they have paid money to satisfy and discharge the indebtedness of the corporation, they will be entitled in equity to be subrogated to the rights of the creditors whose debts they have paid, and to a credit therefor in the final settlement and accounting with the stockholders. But when the corporation has money, or property, or any assets that can be converted into money, with which to redeem and discharge its debts, purchases by the directors in their own behalf will be deemed in bad faith.³

The doctrine is well settled that the option of a corporation to avoid a sale of its property on account of the fiduciary relation existing between the parties, must be exercised within a reasonable time. "This has never been held to be any determinate number of days or years as applied to every case, like the statute of limitations, but must be decided in each case upon all the elements of it which affect that question. These are generally the presence or absence of the parties at the place of the transaction; their knowledge or ignorance of the sale and of the facts which render it voidable; the permanent or fluctuating character of the subject matter of the transaction as affecting its value; and the actual rise or fall of the property in value

¹ *Bradly v. Williams*, 3 *Hughes C. C.* 26.

² *Kitchen v. St. Louis, etc., R.R. Co.*, 69 *Mo.* 224.

³ *Harts v. Brown*, 77 *Ill.* 226.

during the period within which this option might have been exercised.”¹ The *cestui que trust* has no right to lie idly by until equities arise, and speculate on the success or non-success of the transaction.²

§ 123. Power of agent to bind corporation in general.—When the charter provides that certain powers of the corporation shall be exercised by particular officers or agents, the power can be exercised only by such officers or agents, and if other persons attempt to exercise it, their action will be void.³ As a corporation must necessarily act by officers and agents, they are not mere factors. It was objected that the agent of an insurance company had only power to issue policies, and not otherwise to make contracts binding on the company, although he was furnished with policies signed in blank, to be filled up and issued at his discretion. His power of attorney authorized him to “effect insurance,” and “for this purpose to survey risks, fix the rate of premiums, and issue policies of insurance signed by the president.” It was held that this gave him authority to make the preliminary contract as well as to issue the policy; that he was not a special agent employed merely to receive and transmit proposals to his principal, but had power to do whatever the company could do in effecting insurance.⁴ A by-law of a manufacturing corporation pro-

¹ Twin Lick Oil Co. v. Marbury, 91 U. S. (1 Otto) 587, per MILLER, J.

² Kitchen v. St. Louis, etc., R.R. Co., *supra*.

³ Union Mu. Fire Ins. Co. v. Keyser, 32 N. H. 313.

⁴ Sanborn v. Fireman's Ins. Co., 16 Gray, 448. The capital stock of an incorporated insurance company is not the primary or natural fund for the payment of losses which may happen by the destruction of the property insured. The interest upon the capital stock and the premiums received for in-

surance, are the ordinary fund out of which losses are to be paid, and the surplus is to be divided from time to time among the stockholders. The capital stock is a special fund to secure the assured against the extraordinary losses which the primary fund may be found insufficient to meet; and this special fund when broken in upon must be made good from the future profits before any further dividends can be made. The directors of an insurance company should leave a surplus fund, in addition to the capital stock, sufficient to meet

vided that its agent should manage the affairs of the company committed to his care according to the best of his ability, and at all times to exercise the powers with which he was clothed, in his discretion; and promptly to collect all assessments and other sums that should become due to the corporation, and to disburse them, pursuant to the order of the board of directors, saving that the directors should have control over him, and whenever they should give him special directions, he should be bound strictly to adhere to them. It was held that, in the absence of objection on the part of the directors, he was authorized to employ workmen to carry on the business of the concern, and to pay them with the funds of the corporation; or, not being in funds, to give the notes of the corporation in payment.¹ It was held that by the concurrent act of the general agent and treasurer of a manufacturing and trading corporation, the one to give a note for a loan, and thus charge the company with a debt, and the other by a bill of sale, and indorsement of a bill of lading, to transfer a right of property in a quantity of iron belonging to the company, for the security of such note, the property would vest in the mortgagee.² Where the agent of an insurance company has authority to receive premiums, his authority to give the holder of a policy permission to remove the property insured will be implied; and the agent having indorsed on the policy such permission in consideration of the payment to him of additional premium, the company will be bound by it.³ The

the probable losses on the risks then assumed by the company; and if any losses accrue upon such risks, whether more or less than the whole capital of the company, that surplus must be applied to satisfy such losses. If the directors in making dividends abuse their power, they may, in case of a loss sufficient to more than exhaust the entire capital, make themselves personally liable to the creditors of the company.

Scott v. Eagle Fire Ins. Co., 7 Paige Ch. 198.

¹ Bates v. Keith Iron Co., 7 Metc. 224. A general agent of a mining company, in the absence of special authority, cannot make promissory notes in the name of the company. N. Y. Iron Mine v. Negaunee Bank, 39 Mich. 644.

² Fay v. Noble, 12 Cush. 1.

³ New England Fire & Marine Ins. Co. v. Schettler, 38 Ill. 166.

agent of a railroad company being required to engross a contract, and procure the signatures, and no particular time named therefor, it was held that the agent's consent to the delay of a month in the execution of the contract was within his authority, and that the company could not disavow the contract on account of such delay, even if it was unreasonable.¹ If it is claimed that the general agent of a corporation in charge of its land and buildings is authorized to make a lease, and proof of his authority is derived, not from any express words, but from the exercise of the power with the knowledge and approbation of the corporation, the power must be regarded as limited to the description of cases in which it has been exercised, and which serve to prove its existence, and not to extend to cases dissimilar in character.² Where the general control and supervision of the business of a corporation is devolved upon a board of directors, but an agent attends to the daily routine of ordinary business, the latter cannot enter into a contract creating a general lien upon the personal property of the company to secure money borrowed: this requires the action of the directors.³

If the agent does not clothe his proceedings with the formality required by the charter to bind the company, such acts will be deemed negotiations looking to an agreement, rather than a contract obligatory on both parties.⁴ Where one was appointed an agent of a turnpike company to contract for making a certain portion of the road, with the restriction that one-third of the payment on such contracts was to be made in shares in the road, it was held that a contract made by him without this stipulation would not bind the corporation.⁵ The charter of an insurance company provided that no losses should be settled or paid

¹ Pratt v. Hudson River R.R. Co., 21 N. Y. 305.

² Gillis v. Bailey, 17 N. H. 18.

³ Whitwell v. Warner, 20 Vt. 425.

⁴ Head v. Providence Ins. Co., 2 Cranch, 127.

⁵ Hayden v. Middlesex Turnpike Corp., 10 Mass. 403.

without the consent of four of the directors, with the president or two assistants, or a plurality of them. It appeared that the agent of the insured having called to ascertain the determination of the company in relation to the payment of a loss, the secretary went into the room where the president and assistants were convened, and the answer returned was that they had agreed to pay a total loss; but no mention was made of any of the directors being present or assenting to it. It was held not binding on the company.¹

No person or corporation can be made the bailee of another man's goods without his or its own consent express or implied. If the servant, of his own head, and without the authority of his master, takes goods on deposit unknown to his master, although they be deposited in the master's house, he is not answerable, but the servant only. In order to impose a legal liability on any one, there must be a contract express or implied.²

Unless there is a duty to third persons imposed on the treasurer of a savings bank, by virtue of his office, to state what the condition of the depositor's account is, so as to enable another to purchase the book, or to lend money on it as collateral security, the bank cannot be held responsible for frauds committed by means of forged, fictitious, or paid up books, to which the treasurer has given currency by statements that they accurately represent the sums due.³

§ 124. General power of directors.—A director, when not

¹ Beatty v. Marine Ins. Co., 2 Johns. 109.

² Lloyd v. West Branch Bank, 15 Pa. St. 172.

³ Com. v. Reading Savings Bank, 133 Mass. 16. A corporate officer who acts avowedly for himself in a transaction with a corporation is regarded as a stranger to it, and in such a transaction his knowledge will not be imputed to the corporation. Peckham v. Hen-

dren, 76 Ind. 47. Of course, where a person is merely in possession of stock as collateral security, and does not participate in the meetings of the stockholders, and is not recognized by the stockholders as a member, he is not such a part of the corporation as to be bound to have knowledge of the facts in possession of the corporation or of its officers. Baker v. Woolston, 27 Kansas, 185.

proceeding as a member of the board, has no power to represent the corporation or to bind it, unless authorized to do so by the board, in which case he is like any other agent of the corporate body.¹ A board of directors being an instrument of the corporation to manage the corporate affairs and carry out the purposes and objects of the corporate existence, is only empowered to do such things as are expressly or impliedly sanctioned by the charter.² But its acts are binding on the corporation when it proceeds within the scope of its power, however that power may be conferred, and all legitimate business may be transacted by it without the express sanction of the stockholders.³ The character of its authority is the same as that of a managing

¹ Chicago, etc., R.R. Co. v. James, 22 Wis. 194; Stoystown, etc., Turnp. Co. v. Craver, 45 Pa. St. 386; Lockwood v. Thunder Bay River Boom Co., 42 Mich. 536; Baldwin v. Canfield, 26 Minn. 43; Hillyer v. Overman Silver Mining Co., 6 Nevada, 51; Grayville, etc., R.R. Co. v. Burns, 92 Ill. 302; Titus v. Cairo & Fulton R.R. Co., 37 N. J. 98.

² Bank of U. S. v. Dandridge, 12 Wheat. 113; Royalton v. Royalton Turnpike Co., 14 Vt. 311; Marlborough Manf. Co. v. Smith, 2 Conn. 579. The original articles of association of a company provided that there should be no union or consolidation of the company with any other without the consent of a majority of the stockholders. The articles also contained a clause providing for their amendment by a concurrent vote of two-thirds of the executive committee and a majority of the trustees. It was held that the authority to amend did not deprive the stockholders of power to prohibit the merger of the company with any other company, but was only meant to apply to such amendments as were pertinent to the business and objects for which

the association was organized. Blatchford v. Ross, 5 Abb. Pr. N. S. 434. By the articles of association of a mining corporation, the directors were authorized to appoint and remove its agents. It was held that an agreement of the directors with A. to appoint B. agent and manager of the property, and that B. should not be removed by them until he had paid A. a certain amount out of the profits, which sum A. claimed was due him; but that B. might be removed by A. when the latter chose, was not binding on the corporation. Flagg Staff Silver Mining Co. v. Patrick, 2 Utah, 304.

³ Wood v. Whelen, 93 Ill. 153; Sims v. Street R.R. Co., 37 Ohio St. 556. When the charter invests the directors with the power to manage the concerns of the corporation, the power is exclusive in its character. The incorporators have no right to interfere with it, and courts will not, even on a petition of a majority, compel the board to do an act contrary to its judgment. McCullough v. Moss, 5 Denio, 567; Metrop. Elevated R.R. Co. v. Manhattan Elev. R.R. Co., 11 Daly, 373; Flagg v. Manhattan R.R. Co., 20 Blatchf. 142.

board of an unincorporated association.¹ A promissory note was made payable to the president, directors, and company of a bank,* or their order. The act of incorporation gave the general management of the property and concerns of the bank to the directors, and they by their vote authorized the president to indorse this note, which he did. Held proper.² If the charter of a bank gives the management of its affairs to the board of directors, which is expressly made the judge as to what portion of the profits shall from time to time be divided among the stockholders, a very strong case will be required to induce the court to interfere and substitute its own judgment for that of the board.³ Where the articles of a banking association provided that dividends should be declared of so much of the profits as should be deemed expedient by the directors, it was held that, in the absence of an improper and corrupt refusal to make a dividend, the matter was left to the discretion of the directors.⁴ The charter of a bank having authorized the president and directors to dispose of the funds of the institution in such manner as they should deem most advantageous to the corporation, it was held that they had power to buy and sell the stock of the bank, if they found it most advantageous to the bank to do so, at auction, by private sale, for cash, or notes, or other property, or on credit, or could take it in payment of debts due from stockholders, whether solvent or insolvent.⁵ A deed of settlement of a mining company provided that the affairs and business of the company should be under the exclusive control of the directors, and the directors were authorized, if they deemed it best, to create certain shares by vote. Although new shares were created, yet the money obtained for them, as well as the original capital, was exhausted, and

¹ Northampton Bank v. Pepoon, 11 Mass. 288; Stevens v. Hill, 29 Me. 133.

² Spear v. Ladd, 11 Mass. 94.

³ State v. Bank of La., 6 La. 745.

⁴ Ely v. Sprague, Clark, Ch. 251.

⁵ Taylor v. Miami Exporting Co., 6 Ohio, 218. See City Bank of Columbus v. Bruce, 17 N. Y. 507.

certain of the directors, and a member of the company who was not a director, united in borrowing money for the company from the bankers of the company, and gave them their personal guaranty for repayment; which borrowed money was applied by the directors to the payment of necessary disbursements in working the mines. An order having been obtained to wind up the affairs of the company, the bank submitted a claim for the amount so lent to the master, who allowed it; but on appeal, the claim was directed to stand over, with liberty to the bank to bring an action, which being done, the court of law held that the loan by the bank could not be deemed a charge upon the company, but a personal debt of the directors and shareholder who had borrowed the money. Whereupon, the master's order allowing the claim of the bank was discharged. The directors and shareholder then paid the sums advanced, and claimed to be allowed therefor, before the master, as advances made by them to the company. It was held that, as the directors were *quasi* trustees of the company, they were entitled to be repaid their advances, notwithstanding the deed of settlement gave them no power to borrow money.¹ Where a trading corporation was created for the purpose of manufacturing paper, with power to buy and sell, and do other acts incident to such a company, it was held that the directors, who had a general authority to manage its concerns, might pay an agent of the company his wages in advance, and in order to do this give a bill of exchange in the name of the company.² By the deed of settlement of a joint stock company, it was provided that it should not be lawful for the directors to contract any debts in conducting the affairs of the company beyond the sum

¹ *Burmester v. Norris*, 6 Exch. 796; 8 Eng. L. & Eq. 487; *In re German Mining Co.*, 4 De G. M. & G. 19; 27 Eng. L. & Eq. 158.

² *Tripp v. Swanzy Paper Co.*, 13

Pick, 291. In the absence of any provision of law on the subject, it is not the duty of directors to keep the corporate property insured. *Charlestown Boot & Shoe Co. v. Dunsmore*, 60 N. H. 85.

of £100 at any one time, except in the case of the purchase money for a certain newspaper, of which the directors might leave unpaid any part not exceeding £1,000, and might give a promissory note, or accept a bill of exchange on behalf of the company, for such balance. It was held that the directors were authorized to give several notes or bills for the £1,000, and interest, instead of a single note or bill.¹

An assignment of the property of a corporation for the benefit of its creditors may be made by the board of directors when the power of the corporation to do so is not restricted by its charter, without the express authority or consent of the stockholders.²

The court will not, on the application of a majority of the members of a religious society, award a mandamus to compel the trustees, in whom corporate powers are vested, to affix the corporate seal to alterations and amendments to their charter in opposition to their own judgment.³

At common law, a contract between two corporations having some of the directors in common, made by their respective boards, or between a corporation and an individual director, or a firm of which he is a member, is valid.⁴ In *Rolling Stock Co. v. Atlantic, etc., R.R. Co.*,⁵ the court said: "We have not, upon the most diligent research, been able to find a case holding a contract made between two corporations by their respective boards of directors invalid or voidable at the election of one of the parties thereto,

¹ *Thompson v. Wesleyan Newspaper Assoc.*, 8 C. & B. 849.

² *De Camp v. Alward*, 52 Ind. 468; *Dane v. Bank of U. S.*, 5 Watts & Serg. 223.

³ *Com. v. St. Mary's Church*, 6 Serg. & Rawle, 508. See *Grindley v. Barker*, 1 Bos. & Pull. 229.

⁴ *Foster v. Oxford, etc., R.R. Co.*, 13 C. B. 200; *Ernest v. Nichols*, 6 House

of Lds. 401; *Booth v. Robinson*, 55 Md. 419; *Watt's Appeal*, 78 Pa. St. 370; *San Diego v. San Diego, etc., R.R. Co.*, 44 Cal. 106; *Stark Bank v. U. S. Pottery Co.*, 34 Vt. 144; *Griffin v. Inman, Swan & Co.*, 57 Ga. 370; *Wallace v. Long Island R.R. Co.*, 12 Hun, 460.

⁵ 34 Ohio St. 450.

from the mere circumstance that a minority of its board of directors are also directors of the other company. Nor do we think such a rule ought to be adopted. There is no just reason, where a quorum of directors sustaining no relation of trust or duty to the other corporation are present participating in the action of the board, why such action should not be binding upon the company in the absence of such fraud as would lead a court of equity to undo or set aside the transaction. If the mere fact that a minority of one board are members of the other gives the company option to avoid the contract without respect to its fairness, the same result would follow where such minority consisted of but one person, and notwithstanding the board might consist of twenty or more. In our judgment, where a majority of the board are not adversely interested, and have no adverse employment, the right to avoid the contract or transaction does not exist without proof of fraud or unfairness; and hence the fact that five of the defendant's board of directors were members of the plaintiff's board, whatever may have been its effect on the defendant's right to disaffirm or repudiate the contract if exercised within a reasonable time, did not disable the defendant from subsequently affirming the contract if satisfied with its terms, or rejecting it if not; nor did it relieve it from the duty to exercise its election to avoid or rescind within a reasonable time if not willing to abide by its terms."¹

§ 125. **Limitation of power of directors.**—Directors are of course restricted to the power conferred, and if they go

¹ See *Godin v. Cincinnati, etc., Canal Co.*, 18 Ohio St. 169; *Ashurst's Appeal*, 60 Pa. St. 290; *Bill v. Boston Union Telegraph Co.*, 16 Fed. Rep. 14; *Flagg v. Manhattan R.R. Co.*, 20 Blatchford, 142; *People v. Metrop. R.R. Co.*, 26 Hun, 82; *Manhattan R.R. Co. v. N. Y. Elevated R.R. Co.*, 29 Id. 309. When a director contracts with a cor-

poration, he may prescribe his own terms, which the corporation can accept or reject, and, upon the conclusion of the contract, he stands in the same relation to the corporation that any other individual would under the same circumstances. *Central R.R. Co. v. Claghorn*, *Speers's Eq.* 545.

beyond it, their proceedings will not be binding on the corporation. The charter of a corporation provided that the capital stock should be a specified sum which might be increased or diminished from time to time at the pleasure of the corporation; and that all the corporate powers should be vested in and exercised by a board of directors, and such officers and agents as said board should appoint. It was held that an increase of the capital stock could not be made by the directors alone without the consent of the stockholders, unless expressly authorized thereto; the general power to perform all corporate acts, referring merely to the ordinary transactions of the corporation, and not to a reconstruction of the body itself, or to an enlargement of its capital stock. The court said: "If the charter provides that the capital stock may be increased, or that a new business may be adopted by the corporation, this is undoubtedly an authority for the corporation (that is, the shareholders) to make such a change by a stockholder's vote in the regular way. Perhaps a subsequent ratification or assent to a change already made would be equally effective. But if it is desired to confer such a power on the directors so as to make their acts binding and final, it should be expressly conferred. Where the stock expressly allowed by a charter has not been all subscribed, the power of the directors to receive subscriptions for the balance may stand on a different footing. Such an act might perhaps be considered as merely getting in the capital already provided for the operations and necessities of the company, and therefore as belonging to the orderly and proper administration of the company's affairs. Even in such case, prudent and fair directors would prefer to have the sanction of the stockholders to their acts."¹ The fact that, under

¹ Railroad Co. v. Allerton, 18 Wall. 233. See Eidman v. Bowman, 58 Ill. 444; Finley Shoe & Leather Co. v. Kurtz, 34 Mich. 89; Brown v. Fairmount Gold, etc., Co., 10 Phila. 32; Bank Commrs. v. Bank of Brest, 1 Harr. Ch. 106; Metrop. Elevated R.R. Co. v. Manhattan Elevated R.R. Co., 11 Daly, 373; S. C. 14 Abb. N. C. 103.

the charter, the directors have the management of the stock, property, and affairs of the corporation, does not enable them to apply to the legislature for an increase of the powers of the corporation, but such application can only be made by the authority of the company;¹ nor have they power, unless specially authorized, to sell such of its property as is necessary to enable it to transact its customary business;² they being trustees for the purpose of prosecuting the business of the corporation, and not for the purpose of winding it up and destroying its existence.³ The directors of a joint stock company were authorized by a resolution, adopted at a meeting of the shareholders, to borrow money, and they accordingly borrowed £100 from one of the directors, but no meeting was called to approve of the contract. It was held that the contract was void.⁴ By a resolution of the directors of a mining company, four directors were necessary for the doing of any act. Three of the board, who were called trustees, gave a power of attorney to the agent of the company to draw bills. It was held

¹ *Marlborough Manuf. Co. v. Smith*, 2 Conn. 579. The directors of a corporation cannot release a subscriber to stock from his obligation to pay his subscription. *Upton v. Tribilcock*, 91 U. S. (1 Otto) 45; *Gill v. Balis*, 72 Mo. 424; *Chouteau Ins. Co. v. Floyd*, 74 Id. 286.

² *Rollins v. Clay*, 33 Me. 132; *Abbott v. Am. Hard Rubber Co.*, 33 Barb. 578. See *Sheldon v. Hat Blocking Co.*, 56 How. Pr. 70.

³ *Bank Commrs. v. Bank of Brest*, *supra*. A majority of the board of directors of a railroad company, who control a majority of the stock, have no right, unless specially authorized by the charter, to lease the corporate property without first submitting the matter to a meeting of the stockholders. *Martin v. Continental Pass. R.R. Co.*, 14 Phila. 10. Where an incor-

porated company, entitled to act solely through its board of directors, pursuant to a resolution of its stockholders, leased its works to its president, who owned a majority of the stock, and he continued the business the same as before without notice to persons dealing with the company of any change until the lessee failed and assigned the property for the benefit of creditors, it was held that the lease was void. *Conroy v. Port Henry Iron Co.*, 12 Barb. 27.

⁴ *Athenæum Ass. Soc.*, 37 Eng. L. & Eq. 187. Where the directors have passed a resolution fixing the amount to be paid them for their services, the president of the board cannot, unless the other members of the board concur, bind the corporation to pay any of them a larger sum. *Hodges v. Rutland & Burlington R.R. Co.*, 29 Vt. 220.

that the other directors were not liable on those bills, the power of attorney not having been executed in accordance with the resolution.¹ Where a religious society elected a committee of three to superintend the building of a meeting-house, it was held that one of them could not purchase on the credit of the parish. The court remarked that any act to charge the parish must have been by two at least of the three, and perhaps by all three, though direct proof that all assented might not be required.² By the charter of a bridge company, five of the managers were to constitute a quorum, and only four were present when a resolution was passed authorizing a mortgage. It was held that the mortgage was void.³ Where a committee of five was chosen by a religious society to superintend the building of a church, it was held that a contract entered into by one of them for work on the church, could not be enforced against the corporation, and that consequently the other party was not bound by it.⁴ The directors of a corporation are in an important sense regarded as trustees for the stockholders, and it is a breach of duty for them to assume obligations inconsistent with that relation. The rule in its general sense embraces every relation in which there may, by any possibility, arise a conflict between their duty and their individual interests. It acts, not on the possibility that in some cases the sense of that duty may prevail over the motives of self-interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty.⁵ In Great Luxemburgh

¹ Duncarry v. Gill, 4 Car. & P. 121.

² Kupfer v. South Parish in Augusta, 12 Mass. 185.

³ Holcomb v. New Hope Del. Bridge Co., 1 Stockt. Ch. 457.

⁴ Adams v. Hill, 16 Me. 215.

⁵ Michoud v. Gerod, 4 How. 503; Gilman, etc., R.R. Co. v. Kelly, 77 Ill.

426; Simons v. Vulcan Oil & Mining Co., 61 Pa. St. 202; Rice's Appeal, 79 Id. 168; Ryan v. Leavenworth, etc., R.R. Co., 21 Kansas, 365; Blair Town Lot & Land Co. v. Walker, 50 Iowa, 376; Farmers' & Merchants' Bank v. Downey, 53 Cal. 466; Bow v. Brown, 56 N. Y. 288; Koehler v. Black River

R.R. Co. v. Magenay,¹ the Master of the Rolls said: "I have upon various occasions stated what I consider to be the duties and functions of a director of a joint stock company. He is, in point of fact, not only a director, but he also fills the character of a trustee for the shareholders, and he is, in regard to all matters entered into in their behalf, to be treated as an agent; therefore, there attaches to a director, for the benefit of the shareholders, all the liabilities and duties that attach to a trustee or agent. Accord-

Falls Iron Co., 2 Black. 715; Flint, etc., R.R. Co. v. Dewey, 14 Mich. 477; People v. Township Board, etc., 11 Id. 225. In Coal & Iron Co., etc., v. Parish, 42 Md. 598, ALVEY, J., said: "Directors and managers of corporations are within the rule which guards and restrains the dealings and transactions between trustee and *cestui que trust*, and agent and his principal, such directors or managers being in fact trustees and agents of the bodies represented by them. The affairs of corporations are generally intrusted to the exclusive management and control of the board of directors; and there is an inherent obligation implied in the acceptance of such trust, not only that they will use their best efforts to promote the interest of the shareholders, but that they will in no manner use their positions to advance their own individual interests as distinguished from that of the corporation, or acquire interests that may conflict with the fair and proper discharge of their duty. The corporation is entitled to the supervision of all the directors in respect to all the transactions in which it may be concerned; and if one of the directors is allowed to place himself in the position of having his conduct and accounts made the subject of supervision and scrutiny, he of course cannot act in regard to those matters both for himself and the corporation; and the

consequence is that the corporation is deprived of the benefit of his judgment and supervision in regard to matters in which such judgment and supervision might be most essential to its interest and protection. Not only this, the remaining directors are placed in an embarrassing and invidious position of having to pass upon, scrutinize, and check the transactions and accounts of one of their own body with whom they are associated on terms of equality in the general management of all the affairs of the corporation. The design of the rule, therefore, is to secure a faithful discharge of duty, and at the same time to close the door as far as possible against all temptation to do wrong, by subjecting the transactions between parties standing in such confidential relations to the most exact and rigid scrutiny whenever such transactions are brought before the courts. The transaction may be *ipso facto* void, but it is not necessary to establish that there has been actual fraud or imposition practiced by the party holding the confidential or fiduciary relation; the onus of proof being upon him to establish the perfect fairness, adequacy, and equity of the transaction, and that, too, by proof entirely independent of the instrument under which he may claim."

¹ 25 Beavan, 586.

ingly, if a director enters into a contract for the company, he cannot personally derive any benefit from it."¹ In *Charitable Corporation v. Sutton*,² Lord HARDWICKE, in defining the degree of care and fidelity required of a director, and for what nature of default he may be liable, referred to the doctrine of the civil law by which those who are named by companies and corporations to have the direction of their affairs, are obliged to the same care and diligence as factors or agents. And they are answerable not only for any fraud and gross negligence which they may be guilty of, but also for all faults that are contrary to the care required of them.³

The confidence reposed in directors, and the position they occupy toward the corporation and its stockholders, require a strict and faithful discharge of duty, and they are not allowed to derive from their position any profit or advantage whatever, except with the full knowledge and concurrence of the corporation represented by others than themselves.⁴ Directors of a railroad company cannot, with

¹ See *European, etc., R.R. Co. v. Poor*, 59 Me. 277; *Stewart v. Lehigh Valley R.R. Co.*, 38 N. J., 505.

² 2 Atk. 400.

³ 1 Domat, b. 2, tit. 3, sec. 2, art. 1. See *Guild v. Parker*, 43 N. J. 430; *Parker v. Nickerson*, 112 Mass. 195.

⁴ *Booth v. Robinson*, 55 Md. 419. See *Benson v. Heathorn*, 1 Y. & C. 326; *Cumberland Coal Co. v. Sherman*, 30 Barb. 568. In *Hoyle v. Plattsburgh, etc., R.R. Co.*, 54 N.Y. 314, JOHNSON, C., said: "Whether a director of a corporation is to be called a trustee or not in a strict sense, there can be no doubt that his character is fiduciary, being intrusted by others with powers which are to be exercised for the common and general interests of the corporation, and not for his own private interests. He falls, therefore, within the great rule by which equity requires that con-

dence shall not be abused by the party in whom it is reposed, and which it enforces by imposing a disability, either partial or complete, upon the party intrusted to deal on his own behalf in respect to any matter involved in such confidence. Nor is it possible to limit the duty of a director of a corporation in this respect to the time while he is acting as a director under any special delegation of power, or is in attendance at meetings of the board. Such a limit would deprive the rule of almost all its efficacy, and would facilitate innumerable evasions of its force. That the power of a director to act for or to represent the corporation may be so limited in respect to its being bound by his acts, does not furnish any ground for saying that his fiduciary character and consequent duties are subject to the same limit. On the contrary, these

a view to share in the profits, rightfully become members of an improvement company with which the railroad company has a contract to furnish the means with which to build the road. If any gains are realized in the enterprise, they will belong to the railroad company, upon the equitable principle which forbids a person acting in a fiduciary capacity from speculating out of the subject of the trust.¹ A director cannot purchase the property of the corporation, even at a judicial sale, without its consent, or the permission of the court ordering the sale.² Where the directors of a railroad company bought land, with a view to control the location of the road and its depots and stations upon or near it for their private benefit, it was held that the contract could not be enforced or made the basis of any relief.³

It is laid down in some of the text-books that the purchase of corporate property by a director is void, without regard to the good faith of the transaction, and that the property belongs to the corporation the same that it did before such sale. The better opinion, however, is that it

must be held to continue so long as his directorship continues. He cannot, while director, divest himself of the knowledge which he has acquired in confidence of corporate affairs, or of the value of corporate property, nor be allowed to use it to his own advantage."

¹ *Gilman, etc., R.R. Co. v. Kelly*, 77 Ill. 426; *Thomas v. Brownsville, etc., R.R. Co.*, 1 *McCrary*, 392. See *Flint, etc., R.R. Co. v. Dewey*, 14 Mich. 477; *Drury v. Cross*, 7 Wall. 299. It was said by the Supreme Court of the United States that "all arrangements by directors of a railroad company to secure an undue advantage to themselves at its expense by the formation of a new company as an auxiliary to the original one, with an understanding that they, or some of them, shall take

stock in it, and then that valuable contracts shall be given to it, in the profits of which they, as stockholders in the new company, are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the courts for consideration." *Wardell v. Railroad Co.*, 103 U. S. 651, per *FIELD, J.*, aff'g *s. c.* 4 *Dillon*, 330.

² *Covington, etc., R.R. Co. v. Bowler*, 9 Bush. Ky. 468. When directors sell to themselves stock for one-third of what it is worth, they are liable to the corporation and its creditors for the full value of the stock. *Freeman v. Stine*, 15 Phila. 37.

³ *Cook v. Sherman*, 4 *McCrary*, 20; *s. c.* 20 Fed. Rep. 167.

is only to be avoided at the instance of some party in interest.¹ A contract voted by the board of directors with one of their number is not necessarily void because the latter voted.² When the directors have power to bind the corporation, but certain preliminaries are required to be gone through on the part of the corporation before such power can be duly exercised, the person contracting with the directors has a right to presume that they are acting lawfully in what they do, and is therefore not bound to see that all these preliminaries have been observed.³

§ 126. **Power and disability of president.**—Beyond the powers which usage and custom and the necessities and convenience of business require in the executive officer of a corporation, the president has no more control over the corporate property and funds than any other director. He may, however, without any special authority from the board of directors, perform all acts of an ordinary nature which are incident to his office, and may bind the corporation by contracts arising in the usual course of business. To this extent he becomes, in virtue of his election as president, the agent of the corporation.⁴

¹ *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Imboden v. Hunter*, 23 Ark. 622; *West v. Waddill*, 33 Id. 575; *McDowell v. Ark. Mech. & Agr. Co.*, 38 Id. 17; *Kelley v. Newburyport, etc.*, *Horse R.R. Co.*, 141 Mass. 496. The purchase by directors from one holding upon an executory contract of the corporation was held voidable, and the profits of resale by the directors decreed to be held by them in trust for the corporation, although there was no proof of positive fraud. *Parker v. McKenna*, L. R. 10, Ch. 96. When the directors of a manufacturing corporation sold their mill property to the superintendent who had charge of the general business of the corporation, it was held that the sale was voidable in

the absence of affirmative proof that the transaction was fair. *Cook v. Berlin Wool Mill Co.*, 43 Wis. 433. See *Haywood v. Lincoln Lumber Co.*, 64 Id. 639.

² *Leavitt v. Oxford, etc.*, *Mining Co.*, 3 Utah, 265.

³ *Royal British Bank v. Turquand*, 5 E. B. 248; *Fountaine v. Carmarthen Co.*, L. R. 5, Eq. 316.

⁴ *Stokes v. N. J. Pottery Co.*, 46 N. J. 237; *Titus v. Cairo & Fulton R.R. Co.*, 37 Id. 98; *Legett v. N. J. Banking Co.*, Saxton, 541; *Westerfield v. Radde*, 7 Daly, 326; *Bliss v. Kanweah Canal, etc., Co.*, 65 Cal. 502; *Blen v. Bear River, etc.*, *Mining Co.*, 20 Id. 602; *Risley v. Indianapolis, etc., R.R. Co.*, 1 Hun, 202; *Crump v. U. S. Mining*

The president of a bank has very little inherent power. He is generally, if not always, a member of the board of directors. It is his duty to preside at meetings of the board, and he is usually expected to exercise a more constant, immediate, and personal supervision over the affairs of the bank than is required from any other director.¹ As the inherent power of the president of a bank is much more limited than that of the cashier, evidence of powers exercised by him with the knowledge and acquiescence of the bank from which the right to exercise unusual powers can be inferred, should be much stronger in his case than in that of the cashier.² When an act pertaining to the business of the corporation is performed by the president, it will be presumed that the act is legal and binding upon the corporation; and the same is true in relation to such an act of the vice-president done in the absence of the president, or where a vacancy occurs in his office.³ Where, in an action against a corporation on a contract, it was admitted that the president of the corporation was its superintendent and general managing agent, it was held that this was sufficient evidence of his authority to make the contract with the plaintiff, and that it was not necessary for the latter to show any vote or other corporate act constituting the president the agent of the corporation. The court said that it would not be in accordance with justice or the interests of society to allow corporations to deny the authority of such agents, or to repudiate contracts made with them for work and labor from which they derive benefit.⁴ A

Co., 7 Gratt. 352; *Hodges v. Rutland & Burlington R.R. Co.*, 29 Vt. 220; *Ashuelot Manuf. Co. v. Marsh*, 1 Cush. 507; *Bright v. Metairie Cemetery Assoc.*, 33 La. Ann. 58; *Bridgeport Savings Bank v. Eldredge*, 28 Conn. 556; *Union Mut. Life Ins. Co. v. White*, 106 Ill. 67; *First Nat. Bank v. Hoch*, 89 Pa. St. 324. See *Second Av. R.R. Co. v. Mehrbach*, 49 N. Y.

Supr. 267; *Twelfth Street Market Co. v. Jackson*, 102 Pa. St. 269.

¹ *Hodge v. First Nat. Bank*, 22 Gratt. 51.

² *First Nat. Bank v. Kimberlands*, 16 W. Va. 555.

³ *Smith v. Smith*, 62 Ill. 493.

⁴ *Crowley v. Genesee Mining Co.*, 55 Cal. 273.

contract formally executed by the president and cashier of a bank, under the corporate seal, bears the presumption on its face that it was executed by authority of the directors, who are in law the governing body of the bank. But this presumption may be repelled by evidence, and the contract avoided by proof that the president and cashier were never authorized by the board of directors of the bank to execute the contract.¹ A corporation, at a meeting of the stockholders, authorized the corporate officers to execute a deed under the direction of the executive committee. It was held sufficient authority to the president to execute the deed under the direction of the committee, it being an act which in its performance properly belonged to the function of the president.²

In the absence of evidence of want of authority in the president of a corporation to represent and act for it, or any claim upon the trial that he did not represent the corporation, the tender to him of the amount of the assessment upon corporate stock at the office of the corporation during business hours, will be presumed to have been made properly to him, and his refusal to accept it will be regarded as the act of the corporation.³ A conditional subscription accepted by the president of the corporation will be binding on the corporate body.⁴ If, however, it be claimed that he has authority to make or indorse and negotiate promissory notes in behalf of the corporation, the power must in general be shown to have been given him.⁵ Where the cashier of a bank, under an agreement between him and the president, bought certain stock of the bank with money borrowed from the bank, for which he gave

¹ *Asher v. Sutton*, 31 Kansas, 286.

⁴ *Pittsburgh, etc., R.R. Co. v. Stewart*, 41 Pa. St. 54.

² *Merchants' Bank, etc., v. Goddin*, 76 Va. 503.

⁵ *Bacon v. Miss. Ins. Co.*, 31 Miss.

³ *Mitchell v. Vt. Copper Mining Co.*, 67 N. Y. 280. See *Plumb v. Cattaraugus Co. Mu. Ins. Co.*, 18 N. Y. 392; *Dougherty v. Hunter*, 54 Pa. St. 380.

116; *McCullough v. Moss*, 5 Denio, 567; *Marine Bank v. Clements*, 3 Bosw. 600.

his note indorsed by the president, it was held that the knowledge of the president and cashier of the transaction did not constitute notice to the bank, and that the bank was not bound to hold the note for the protection of the president.¹

The fact that the president is the general manager of the corporate concerns, transacting all of the business of the corporation, will authorize him to give in its name a promissory note for its indebtedness arising in the business.² The president of a railroad company, who is the financial agent of the company to negotiate its assets for the purpose of raising money upon them, may indorse and assign notes and mortgages given to the company to aid in the construction of the road.³ Where the president of a corporation signed in its behalf a contract for real and personal property and gave promissory notes for the purchase money, it was held that he thereby affirmed the transaction to have been authorized by the corporation, and to be such an one as he had a right to enter into, and was estopped to assert its invalidity.⁴ If the president of an insurance company has power to adjust and pay all losses, and the means at his disposal for that purpose are negotiable notes, and no provision has been made for their indorsement by a treasurer or other agent of the company specially authorized, it will be presumed to be the duty of the president to indorse and transfer them from time to time as they shall be needed.⁵ The president and cashier of a bank cannot

¹ First Nat. Bank v. Gifford, 47 Iowa, 575.

² Castle v. Belfast Foundry Co., 72 Me. 167.

³ Irwin v. Bailey, 8 Biss. 523. See Kraft v. Freeman Printing, etc., Assoc., 87 N. Y. 628. The president of a railroad company has no power by virtue of his office to sell the property of the company. Walworth County Bank v. Farmers' Loan and Trust Co., 14 Wis. 325.

⁴ Moss v. Averill, 10 N. Y. (6 Seld.) 449.

⁵ Baker v. Cotter, 45 Me. 236. See Caryl v. McElrath, 3 Sandf. 176. When it is the usual custom of a corporation to transfer its notes by the mere indorsement of the president, such indorsement is all that is requisite to effect a transfer of the title where the transfer itself is authorized by a resolution of the directors. Clark v. Titcomb, 42 Barb. 122.

make a valid agreement with the indorser of a promissory note that he shall not be liable on his indorsement. In *Bank of U. S. v. Dunn*,¹ it was said by the court not to be the duty of the president and cashier to make such contracts, and that they had no power to bind the bank except in the discharge of their ordinary duties; that all discounts were made under the authority of the directors, and it was for them to fix any conditions they might think proper in loaning money. An act of incorporation provided that the affairs of a bank should be managed by thirteen directors, a majority of whom, the president being one, should form a board or quorum for the transaction of any business, but that ordinary discounts might be made by the president and four directors. It was held not competent for the president or cashier to discount paper for the bank in the absence and without the consent of the requisite number of directors.²

Where there is nothing in the charter of a corporation which gives the president any greater control over its funds than is given to any director, he is not authorized to draw checks for money deposited in the bank in the name of the corporation, by virtue of his office as president merely, unless by the established usage of the place where the operations of the corporation are to be carried on, the president *ex officio*, and without any special authority, exercises that power. The officers of a bank have therefore no right to presume, from the mere fact that a person is president, that he is authorized to manage and control the moneys deposited in the bank to the credit of the corporation. If, however, by the negligence of those who have the funds in their possession, they have been deposited in such a manner as

¹ 6 Pet. 51.

² *Manderson v. Com. Bank of Pa.*, 28 Pa. St. 379. The president and cashier of a bank, who have the whole control of the money matters of the bank,

cannot lawfully use the property of the bank for their individual benefit. *Rhodes v. Webb*, 24 Minn. 292. See *Davis v. Rock Creek, etc., Co.*, 55 Cal. 359.

to give the officers of the bank reason to suppose that the deposit was made by the president of the corporation, the latter must sustain the loss.¹

By the act incorporating the New Jersey and Manufacturing Banking Company, it was provided that all the affairs, property, and concerns of the corporation should be managed by eleven directors elected annually, and that the directors for the time being, or a majority of them, should have power to make and prescribe such by-laws, rules, and regulations as then should appear needful and proper, touching the government of the corporation, the management and disposition of the stock, business, and effects. The president and cashier having executed a mortgage of the real estate of the bank and affixed thereto the corporate seal, it was urged on the argument that, as they were the openly acknowledged agents of the corporation, if they had abused their trust third persons ought not to suffer by their misconduct; and that their acts should bind the corporation provided they were such as the corporation itself might lawfully do or order to be done; and that within this limit, strangers or third persons were not bound to inquire whether the mode of doing the acts were according to the internal regulations of the corporation or not. It was held, however, that, under the rule that a corporation is only bound by the acts of its agents done within the scope of their authority, the mortgage was not available against the bank.²

It is not necessary that each instrument appropriate for the convenient managing and disposing of the estate of a corporation should be specified in a vote of the directors, provided the general power to perform acts which may embrace the execution of such instruments is conferred. The authority to sell as well as convey land implies a

¹ *Fulton Bank v. N. Y. & Sharon Canal Co.*, 4 Paige Ch. 126.

² *Leggett v. N. J. Manf. & Banking Co.*, Saxton Ch. 541.

power to negotiate and make a bargain with a purchaser prior to conveyance.¹ Where a general agent was authorized by the by-laws of a railroad company to enter into contracts for the transportation of freight with the approval of the president, it was held that this restriction meant that the contracts of the agent should be subject to the approval of the president whenever he deemed it prudent to interfere; but that if he did not think proper to interpose, and neglected to apprise the public that every special contract for the transportation of freight must be ratified by him, the company would be liable for the fulfilment of the contract.² The managing officers of a corporation have in general power to employ attorneys and counsellors without a vote or resolution of the board of directors, or of the stockholders.³

¹ *Augusta Bank v. Hamblett*, 35 Me. 491.

² *Medbury v. N. Y. R.R. Co.*, 26 Barb. 564.

³ *Western Bank of Mo. v. Gilstrap*, 45 Mo. 419. When the duties of the president are not prescribed by the charter or by-laws, he may employ and dismiss counsel and defend suits. *Coleman v. West Va. Oil, etc., Co.*, 25 W. Va. 148. "It is a matter of daily occurrence for the president and other head officers of corporations to employ and retain attorneys and counsel to prosecute or defend suits, or to assist in legal proceedings in which the corporation is interested. And I doubt whether it is usual for members of the bar to take the precaution to inquire, when they are thus retained, whether there has been a formal resolution of the board of directors authorizing their retainer in the case." *WALWORTH, Ch.*, in *Am. Ins. Co. v. Oakley*, 9 Paige Ch. 496. In an action by an attorney against a bank to recover for his legal services in behalf of the bank, *BEARDSLEY, J.*, said: "In the absence of all

proof to the contrary, we think it must be assumed that the president was duly authorized to institute and carry out that proceeding for the bank. There was nothing shown on the trial to repel the presumption of such authority, but much to confirm it. . . . The cashier, who was the principal financial officer, had, as was shown by his letter, employed or authorized the solicitor to carry on the chancery proceedings. . . . The fact that the directors refused to ratify what had been done by the president was not admissible evidence against the plaintiff." *Mumford v. Hawkins*, 5 Denio, 355. See *Southgate v. Atlantic & Pacific R.R. Co.*, 61 Mo. 89; *Frost v. Domestic Sewing Machine Co.*, 133 Mass. 563. It was held that a municipal corporation had no power at common law to employ counsel to assist in the prosecution of former officers of the city for crime committed while engaged in the discharge of their official duties. *Butler v. City of Milwaukee*, 15 Wis. 493. *DIXON, C. J.*: "It might be a difficult task to enumerate the general powers

§ 127. **Power and disability of cashier or treasurer.**—The cashier of a bank is an agent of the corporation within the scope of his powers. He gives security for the faithful discharge of his duties, and is liable to the corporation for his defaults. His duties do not spring out of his election, but out of his office as defined by the general law.¹ The daily financial operations are generally confided to him and the teller. He has usually charge of the funds, receiving directly all money and notes, and surrendering discounted notes on payment. He is the executive officer through and by whom the moneyed operations of the bank in making or receiving payments or discharging debts are conducted.² He has a general authority to superintend the

of municipal corporations at common law, but I can find no difficulty in saying what I think is not one of them, and that is the public prosecution of officers of the kind mentioned in the complaint, especially when ample provision is otherwise made by law. If the common council might engage in the prosecution of these, and charge the city with the expense, no reason is perceived why they may not do the same as to all others committed within the corporate limits, and thus double the burdens of the citizens. The doctrine that a corporation may exceed its powers and still be bound upon the principle of an estoppel,—that it shall not allege its own wrong to avoid just responsibility to an innocent third person,—I think more strictly applicable to private than public corporations. The acts of the officers of the latter more nearly resemble those of public agents which are not binding unless authorized. At all events, I do not think the corporation should be bound in cases like this when it receives no direct pecuniary equivalent for the sum demanded." See *Vincent v. Nantucket*, 12 Cush. 103; *Merrill v. Plainfield*, 45 N. H. 126.

¹ *Carey v. Giles*, 10 Ga. 9.

² *Lafayette Bank v. State Bank of Ill.*, 4 McLean, 208; *Ryan v. Dunlap*, 17 Ill. 40; *Crocket v. Young*, 1 Smed. & Marsh, 241; *Perkins v. Bradley*, 24 Vt. 66; *Barnes v. Ontario Bank*, 19 N. Y. 152. In *Bank of U. S. v. Dunn*, 6 Pet. 51, the court defined the cashier of a bank to be an executive officer by whom its debts are received and paid, and its securities taken and transferred, and his acts to be binding upon the bank must be done within the ordinary course of his duties. His ordinary duties are to keep all of the funds of the bank, its notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives directly, or through the subordinate officers of the bank, all money and notes of the bank, delivering up all discounted notes and other securities when they have been paid, draws checks to withdraw the funds of the bank where they have been deposited, and, as the executive officer of the bank, transacts most of its business. See *Bank of Metropolis v. Jones*, 8 Pet. 12; *Bissell v. First Nat. Bank*, 69 Pa. St. 415; *Wakefield Bank v. Truesdell*, 55 Barb.

collection of notes under protest, and to make such arrangements as may facilitate that object by compromise or otherwise. He cannot alter the nature of the debt, or change the relations of the bank from a creditor to the agent of its debtor. If, however, the bank, with knowledge of all the facts, adopts or acquiesces in his acts, it cannot afterward be heard to impeach them on the ground that they were done without authority, or contrary to instructions.¹ He may certify a check, the certificate answering the supposed inquiry of the holder of the check, or of one about to take it, as to whether the maker has funds on deposit in the bank out of which it can be paid. Whether, upon receiving a check, he pays it in money, or gives the holder a certificate of deposit, or draft, or a certificate that he will retain sufficient of the money standing to the drawer's credit to pay it when presented, he is, in either case, acting in the line of his duty, and within the scope of the authority which necessarily attaches to his office. But when the certificate is given in the absence of funds, a *bona fide* holder only can enforce liability against the bank.² The liability of a bank on a certified check legally results from the nature of the agreement and

602; *Caldwell v. Mohawk, etc., Bank*, 64 Barb. 333; *Merchants' Bank v. State Bank*, 10 Wall. 604. A bank may be liable on an indorsement made by the cashier in the street after bank hours. *Bissell v. First Nat. Bank, supra*. The cashier has a right incident to his office to borrow money for the bank, and to pledge the property of the bank to secure the loan. *Coats v. Donnell*, 94 N. Y. 168.

¹ *Bank of Pennsylvania v. Reed*, 1 Watts & Serg. 101. See *Coheco Nat. Bank v. Haskell*, 51 N. H. 116. Where, in an action by a bank against the parties to a note held by it, it was proved that the cashier, after consulting with two or more directors, entered into an

agreement which, if carried out, would discharge all of the parties to the note but one, it was held that his acts were binding on the bank. *Payne v. Commercial Bank of Natchez*, 6 Smed. & Marsh, 24. It may be inferred that a cashier has been permitted by the directors to pursue a particular course outside of his ordinary duties, from his having done so for a long period. *Martin v. Webb*, 110 U. S. 7.

² *Merchants' Bank v. State Bank, supra*; *Clarke Nat. Bank v. Bank of Albion*, 52 Barb. 592; *Cooke v. State Nat. Bank of Boston*, 52 N. Y. 96. The cashier of a bank has no authority to certify post-dated checks. *Clarke Nat. Bank v. Bank of Albion, supra*.

the well-settled rules of law, and does not depend upon usage or custom. The bank having placed the cashier in the position which implies authority in the premises, those who deal with the bank have a right to infer that he possesses it, and although the exercise of it in a given case may not be warranted on account of the existence or non-existence of some extrinsic fact peculiarly within his official knowledge, yet the bank is responsible, instead of an innocent party.¹ Errors of certification may be corrected before the other party acting upon them has incurred any loss or damage, or assumed any new rights or liabilities.² When a bank certifies a check to be good, it assumes a liability like that of an acceptor of a draft. By the certificate it guarantees the genuineness of the drawer's signature, and represents that it has funds of the drawer in its possession, sufficient to meet the check, and it engages that those funds shall not be withdrawn from it by the drawer to the prejudice of any *bona fide* holder of the check. It does not import that the body of the check is genuine, or that the funds on deposit with it are absolutely applicable to the payment of the precise check certified. When, therefore, a check has been raised by some person without authority before certification, the certifying bank cannot be called upon, in consequence of its certification, to pay the amount of the raised check; and when a bank has certified to a raised check by mistake, and subsequently pays the money thereon, without any culpable negligence on its part, it can recover the amount thus paid back.³

A bank is not bound to receive a deposit or to keep the funds of every one who offers money for that purpose. It may select its dealers and receive such as it pleases. For

¹ Cook v. State Nat. Bank, 52 N. Y. 96. Mechanics' Banking Assoc., 55 N. Y. 211; Marine Nat. Bank v. Nat. City

² Second Nat. Bank v. Western Nat. Bank, 51 Md. 128. Bank, 59 Id. 67; Clews v. Bank of N. Y., 89 Id. 418; Espy v. Bank of Cin-

³ Nat. Bank of Commerce v. Nat. cinnati, 18 Wall. 604.

the purposes of this selection the cashier is the proper officer. The bank pays for its dealers who have funds to their credit, such bills and notes accepted or drawn by them as are payable at the bank. The latter circumstance is deemed an order of the depositor for the payment of the bill or note out of his deposit. A person may become a dealer by a deposit made on the day his draft or note falls due, although he may never before have been in the bank; but his deposit must be made with the proper officer of the institution, and with the requisite assent to his becoming such dealer.¹

To make a bank liable on the contract of a cashier in its behalf, it must be shown that he was authorized to make the contract. Where, therefore, in an action by the holder

¹ *Thatcher v. Bank of the State of New York*, 5 Sandf. 121. "A certificate of deposit is a negotiable instrument which a bank, through its cashier and teller, and frequently through the latter, is in the habit of issuing, and their acts are constantly recognized by the president and directors in their official intercourse with the bank. A book is kept, containing the names of depositors and the amounts and certificates issued, and although it appears from such book that no entry of a particular certificate was made, yet a holder for value without notice will be protected in his rights." *Barnes v. Ontario Bank*, 19 N. Y. 152, per ALLEN, J. Where the cashier voluntarily receives securities for safe keeping, the bank will not be liable for the loss, unless the directors knew of the deposit and acquiesced in it. *First Nat. Bank v. Graham*, 79 Pa. St. 106; 100 U. S. 699. But, although the contract be illegal and void, the bank is bound, in good faith and in law, to return the deposit, or to keep it without gross negligence, until it is called for. If, when applied for, it is refused, it, or its

value, according to the form of the action, may be recovered. The only way to escape from liability open to the depositary is to return the property to the owner, or to get rid of its possession otherwise, in some lawful way. Gross negligence on the part of a gratuitous bailee, though not a fraud, is in legal effect the same thing. *Ib.* In *Wiley v. First Nat. Bank*, 47 Vt. 546, it was held that the cashiers of national banks, organized under the act of Congress of 1864, were not authorized to take special deposits to keep merely for the accommodation of the depositors. *S. P. Whitney v. First Nat. Bank*, 50 Id. 388. See *Foster v. Essex Bank*, 17 Mass. 479; *Marine Bank v. Chandler*, 27 Ill. 479; *Coffey v. Bank*, 46 Mo. 140; *Leach v. Hale*, 31 Iowa, 69; 7 Am. Rep. 112; *Scott v. Nat. Bank*, 72 Pa. St. 471; *Smith v. First Nat. Bank*, 99 Mass. 605; *Lancaster Nat. Bank v. Smith*, 62 Pa. St. 47; *Hale v. Rawallie*, 8 Kans. 137; *Ray v. Bank of Ky.*, 10 Bush. 344; *De Haven v. Kensington Nat. Bank*, 81 Pa. St. 95; *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82.

of a bill of exchange against a bank, it appeared that the bill was indorsed, "Pay E. Ludlow, Cas., or order," signed, "P. S. Campbell, Cas.," and that the latter, who was the defendant's cashier, was authorized to indorse for the sole purpose of transmitting to other banks for collection bills and notes deposited with the defendant, or discounted by it, it was held that the bank was not liable on the indorsement.¹ The cashier of a bank cannot render the bank liable as an accommodation indorser on his individual note, and the payee, in order to recover against the bank thereon, must prove that the cashier had such authority.² Moodie, cashier of a bank, wrote to the secretary of the treasury that one Miner, a director of the bank, was authorized to contract in its behalf for the transfer of a specified sum of money from New York to New Orleans, to be deposited in the treasury at the latter city, free of charge, by a certain date. The secretary of the treasury having accepted the proposition, Miner received a draft for the amount named, but the money was not repaid in New Orleans, and there was no evidence that the bank ever received any portion

¹ Bank of State of N. Y. v. Farmers' Branch Bank of Ohio, 36 Barb. 332.

² West St. Louis Savings Bank v. Shawnee County Bank, 95 U. S. (5 Otto) 557, aff'g s. c. 3 Dillon, 403. "Ordinarily, the cashier being the ostensible officer of a bank, is presumed to have, in the absence of positive restrictions, all the power necessary for such an officer in the transaction of the legitimate business of banking. Thus, he is generally understood to have authority to indorse the commercial paper of his bank, and to bind the bank by the indorsement. So, too, in the absence of restrictions, if he has procured a *bona fide* re-discount of the paper of the bank, his acts will be binding, because of his implied power to transact such business; but certainly he is not

presumed to have power, by reason of his official position, to bind his bank as an accommodation indorser of his own promissory note. Such a transaction would not be within the scope of his general powers; and one who accepts an indorsement of that character, if a contest arise, must prove actual authority before he can recover. There are no presumptions in favor of such a delegation of power. The very form of the paper itself carries notice to a purchaser of a possible want of power to make the indorsement, and is sufficient to put him on his guard. If he fails to avail himself of the notice, and to obtain the information which is thus suggested to him, it is his own fault, and, as against an innocent party, he must bear the loss." Ibid., per WAITE, C. J.

of it. It appeared that Moodie was not authorized by the board or by any member of it to constitute Miner an agent for such a purpose, and that the directors had no knowledge of Moodie's letter. It was held that the bank was not liable to refund the money advanced by the secretary of the treasury, and that the following charge to the jury in the court below was unobjectionable: "That if they should find that the letter written by Moodie was his own act, and had been done without the knowledge of the board of directors, or of any of them individually except Miner, and that the agency of Miner was not constituted by, or known to, the board of directors or the directors individually, or any of them except Miner, but was the act of the cashier alone; and if they should find that Moodie had no power as cashier except such as belonged to the office of cashier generally, or such as was given by the charter or a by-law or other law or usage of the said bank, that the defendant was not concluded by that letter and was not bound by the contract made by Miner, without some subsequent ratification of the same, though the secretary had, in contracting with Miner, relied upon it as the act of the bank."¹

The cashier of a bank cannot assign a promissory note not negotiable without permission of the bank, shown by a resolution of the board of directors, usage in similar circumstances, or in some other way;² nor pledge its assets for the payment of an antecedent debt.³ The treasurer of

¹ U. S. v. City Bank of Columbus, 21 How. 356. "The term ordinary business, with direct reference to the duties of cashiers of banks, occurs frequently in English cases, and in the reports of the decisions of our State courts; and in no one of them has it been judicially allowed to comprehend a contract made by a cashier without an express delegation of power from a board of directors to do so which involves the payment of money, unless it be such as

has been loaned in the usual and customary way. Nor has it ever been decided that a cashier could purchase or sell the property, or create an agency of any kind for a bank, which he had not been authorized to make by those to whom has been confided the power to manage its business both ordinary and extraordinary." Ibid., per WAYNE, J.

² Barrick v. Austin, 21 Barb. 241.

³ State of Tenn. v. Davis, 50 How.

a corporation has not usually authority to assume the debt of a third person, such a transaction being foreign to the ordinary course of business; and the directors have no such power, unless there is an urgent necessity for doing it in order to save the credit of the corporation.¹ Where a party claims a discharge from a debt due a bank not by payment, but by giving other or different notes, bills, or securities, which the cashier has agreed to take and release the debt, the authority of the cashier to pursue such a course must be established by proof.² The office of treasurer of a savings bank does not of itself clothe him with authority to give in behalf of the bank a technical release under seal, and such power if claimed must be shown by a vote.³

The cashier of a bank does not possess incidental authority to make any declarations binding the bank not within the scope of his ordinary duties, and if he should promise to pay a debt which the corporation did not owe and was not liable to pay, or should admit forged bills of the bank to be genuine, the bank would not be bound by such promise or admission unless it had authorized or adopted the act.⁴

§ 128. **Power and disability of teller of bank.**—The official employment of a teller consists in receiving money offered by customers of the bank to be deposited to their credit, whether such as is brought by them to the bank, or the proceeds of discounts made by them; to receive money offered at the bank in payment of notes and bills previously discounted or lodged for collection as they severally fall due; to pay the checks of depositors as the money is from

Pr. 447. If it were otherwise, he might by these means dispose of all the assets of the corporation.

¹ Stark Bank v. N. S. Pottery Co., 34 Vt. 144.

² Sandy River Bank v. Merchants', etc., Bank, 1 Biss. 146.

³ Dedham Inst. for Savings v. Slack, 6 Cush. 408.

⁴ Merchants' Bank v. Marine Bank, 3 Gill, 96, referring to Story's Agency, sec. 115; Gloucester Bank v. Salem Bank, 17 Mass. 33.

time to time drawn out or for notes discounted ; to redeem the bills of the bank with specie when demanded ; and to account for the money he has received and paid out, not only to prevent mistakes, but to charge him when short or delinquent. When checks on other banks are received in payment or on deposit, it is his duty to attend to their collection at a regular hour of the day. He is liable to pay the amount of a check when the drawer has not funds to his credit ; unless he applies to the bookkeeper for information as to the state of the drawer's account, and then, if an overpayment is made through the mistake of the bookkeeper, he, and not the teller, is responsible for the loss.¹

It is customary for the teller to certify checks, which is simply answering the supposed inquiry of one about to take a check, whether the bank has funds of the drawer to meet it ; though the practice seems to have been regarded with disfavor in Massachusetts. In *Mussey v. Eagle Bank*,² the court said that such a power was neither incident nor necessary to the faithful discharge of a teller's duties. HUBBARD, J., stated the objections thus : " It would give to bank checks, which are intended for immediate use and are substitutes for specie in the ordinary transactions of business, the character of bills of exchange payable to the bearer, the bank being acceptor, and payable at an indefinite time. It would lead to loans to favored individuals without the usual security. It would substitute checks for cash in the hands of tellers who receive them ; and would confer the power upon a single officer to pledge the credit of the bank by the mere writing of his name, a power never contemplated by the legislature nor intended to be conferred by the stockholders. It would expose the teller to the fraud of a bookkeeper, and both of them to the temptations of unprincipled and greedy men who might under various pretences procure their checks to be thus certified

¹ *Mussey v. Eagle Bank*, 9 Metc. 306.

² 9 Metc. 306.

in the first instances when their deposits were good, and afterward, when there was no balance to their credit, allow interest as a bonus for the certificate to the certifying officer, who would afterward receive such checks as cash." The New York Court of Appeals, in expressing a contrary view, per SELDEN, J., said: "No other officer or agent of the bank would seem to be so competent to give the answer as the paying teller. His duties impose upon him the necessity of knowing the state of every depositor's account. He is charged with all he pays out, and if he pays a check without funds in hand, he is responsible to the bank for the amount. His knowledge exceeds that of the bookkeeper, because, to the information obtained from the latter, he adds a knowledge whether any deposits have been made or checks paid since the last entry in the books. No doubt the cashier, by virtue of his general powers and his presumed knowledge of all the affairs of the bank, would be competent to answer the question; but he could only do so by first inquiring of the bookkeeper and teller. Why should the applicant be compelled to seek the information through this circuitous channel, instead of going directly to the ultimate source of knowledge on the subject? The teller is put in the place of the cashier to perform a portion of his duties. His appointment is virtually a division of the office of cashier; and that branch of the office which the teller fills, embraces those duties which particularly require a knowledge of the state of the accounts of the depositors. Why, then, should he not be the organ of communication on the subject? But it is unnecessary in the present case to decide this question, as it clearly appears not only that the teller, Peck, was in the habit of certifying the checks of customers with the knowledge of the officers of the bank, but that he was furnished with a book for the express purpose of keeping a memorandum of such checks. His authority to certify, therefore, in a proper case cannot

be disputed. But it is insisted that his power extended only to cases where the bank had funds in hand, he having been expressly prohibited from certifying in the absence of funds, and hence that the bank is not bound. It may be doubted whether such a prohibition adds anything to the restrictions which would otherwise exist upon the powers of the agent. A teller acting under a general power to certify checks would be guilty of an excess of authority and a clear violation of duty, if he certified without funds. The powers of the cashier himself, or other principal financial officer of the bank, would no doubt be subject to the same limitation."¹ "A party who holds in good faith for value a check negotiable on its face, certified by the paying teller of the bank on which it is drawn to be good, is entitled to payment of the check, although the drawer has not funds in the bank to meet it, and the teller certified the check in violation of duty, and for the accommodation of the drawer."²

§ 129. Power and disability of secretary.—The secretary and general superintendent of a gas company to whom applications for gas are made, and who exercises a general control over the business and affairs of the company, may waive regulations requiring written application for gas.³ But the secretary of a railroad or other company has no authority to bind the company by letters or documents signed by him.⁴

§ 130. Power and disability of superintendent.—As a general managing agent and superintendent is the representative of the corporation, and may do in the transaction of its ordinary affairs what the corporation itself could do

¹ *Farmers', etc., Bank v. Butchers', etc., Bank*, 14 N. Y. 623, *aff'd* 16 Id. 125.

² *Ibid.* The same was held where a note was certified falsely by the teller. *Meads v. Merchants' Bank*, 25 N.Y.143.

³ *Shepherd v. Milwaukee Gas Light Co.*, 11 Wis. 234.

⁴ *Williams v. Chester, etc., R.R. Co.*, 15 Jur. 828; 5 Eng. L. & Eq. 497; *First Nat. Bank v. Hogan*, 47 Mo. 472; *Blood v. Marcuse*, 38 Cal. 590.

within the scope of its powers, he may assign the choses in action of the corporation to its creditors either in payment of, or as security for the payment of, a precedent debt of the corporation without the express authority of the board of directors.¹ But the authority of a superintendent cannot lawfully be exercised beyond the scope of his obvious functions and duties. The only evidence of the nature and extent of the powers of a superintendent was such as the title of his office implied, and that furnished by his testimony, which was, that everything connected with the running of the road was under his supervision and control; that he had no direction over the treasury, and no share in the conduct of the company's affairs; that he paid drivers, conductors, and other persons employed by him for the company, in connection with his business as superintendent. It was held that it could not be inferred that he was authorized by his office to arrange and liquidate claims made against the company for the negligence of its servants in running its trains, or to contract with third persons as its agent to repair or remedy the consequences of such negligence.²

§ 131. **Pay for services.**—The salary or compensation of corporate officers, when allowed, is commonly fixed by a by-law, or by a resolution either of the directors or shareholders. Corporate offices are usually filled by the chief promoters of the corporation, whose interest in the stock, or in other incidental advantages, may be presumed a motive for exercising the duties of the office without compensation, and this presumption, when it arises, will prevail until overcome by an express prearrangement for salary.³ Where the

¹ McKiernan v. Lienzen, 56 Cal. 61. See Seeley v. San Jose Mill Co., 59 Id. 22; Chemical Nat. Bank v. Kohner, 85 N. Y. 189.

² Stephenson v. N. Y. & Harlem R.R. Co., 2 Duer, 341.

³ Kilpatrick v. Penrose Ferry Bridge Co., 49 Pa. St. 118. See Citizens' Nat. Bank v. Elliott, 55 Iowa, 104; N. Y. & Harlem R.R. Co. v. Ketchum, 27 Conn. 180; Loan Assoc. v. Stonemetz, 29 Pa. St. 534; Merrick v. Peru Coal Co., 61

by-laws of a corporation provided that no officer should receive any other compensation for his services than should be determined and allowed by the stockholders at the annual meeting, or at a special meeting called for that purpose, and no such allowance was ever made for the services of the president of the company, it was held that he could not recover for such services.¹ The engagement of a person by a corporation to perform services in its behalf during the time for which it shall be established, and to pay him so long as he shall continue to perform his part of the agreement, with a proviso that by the death of the party so contracting the corporation shall be discharged, is binding on the corporation. It is, in effect, a contract for life, or until determined by the dissolution of the corporation in a mode fixed by law.² A director, by resolution of the board, may be empowered to transact any business or agency in behalf of the corporation; and unless there is some agreement, express or implied from the circumstances attending such appointment, to the contrary, the law will infer a contract on the part of the corporation with its agent, whether he be a director or a stranger, that he shall receive for such service a reasonable compensation.³ Where the charter of a bank provided that no director should be entitled to any emolument unless the same were allowed by the stockholders at a general meeting, it was held to

Ill. 472; *Cheney v. Lafayette, etc.*, R.R. Co., 68 Id. 570; 87 Id. 446; *Holder v. same*, 71 Id. 106; *Santa Clara Manuf. Assoc. v. Meredith*, 49 Md. 389.

¹ *Illinois Linen Co. v. Hough*, 91 Ill. 63. Where an officer of a corporation having a claim against it of \$2,500 for services, received from the company \$10,000 worth of stock at its market price of twenty-five per cent. of its nominal value, it was held that he thereby became a stockholder, and was liable to the creditors of the corpora-

tion for the difference between the worth of his services and the par value of the stock, notwithstanding he cancelled and handed back the certificate. *Chouteau v. Dean*, 7 Mo. App. 210.

² See *People v. Globe Mut. Ins. Co.*, 91 N. Y. 174.

³ *Shackleford v. New Orleans, etc., R.R. Co.*, 37 Miss. 202. See *Santa Clara Mining Assoc. v. Meredith*, 49 Md. 389; *Rogers v. Hastings, etc., R.R. Co.*, 22 Minn. 25.

have been the intention of the legislature that directors should not receive compensation for the performance of their appropriate duties, but not to exclude individual members of the board from a just compensation for services of a different character merely because such services were rendered while they were directors.¹ It has been held that a town may indemnify a surveyor of highways for liabilities incurred in the *bona fide* discharge of his duties, for the reason that the town is bound to repair highways, and is responsible for defects in them, and therefore has so direct an interest in the subject that it can adopt the acts of the surveyor done as the agent of the town in a matter relating to town affairs, his duties being the duties of the town.² So towns may bind themselves by vote to indemnify a collector of taxes for the costs and expenses of defending actions brought against him for acts done in the performance of his duties; because what he does is by authority of the town and as its agent, at least in collecting taxes raised by the town, and the town may ratify and affirm his acts.³ But it is otherwise in the case of the officers of a town who do not act as its agents or servants, but in a judicial capacity, and where the town has no control

¹ Chandler v. Monmouth Bank, 1 Green N. J. 255. It was remarked by the court in this case that "Services may be wanted requiring mechanical or professional skill, as, for instance, the engraving of the plates, the making of paper, etc. Should one of the directors be competent to perform this work, the charter was never intended to prohibit his employment for that purpose. And again, services may be required which, although they might be performed by the whole board of directors, yet are to be transacted at distant places, or under circumstances which would make it extremely inconvenient for a body of men to attend to them, and where a proper discharge of

their duties to the company would require the directors to constitute an agency. In such cases, I see no objection to their employing one of their own number as their agent. Indeed, the nature of the business may often be such as would render this highly expedient. And if they should do so, such agent may surely demand and be paid a reasonable compensation for his services." Approved in Henry v. Burlington R.R. Co., 27 Vt. 435. See New Orleans, etc., Packet Co. v. Brown, 36 La. Ann. 138; 51 Am. Rep. 5; Citizens' Nat. Bank v. Elliott, 55 Iowa, 104; Ward v. Polk, 70 Ind. 309.

² Bancroft v. Lynnfield, 18 Pick. 566.

³ Pike v. Middleton, 12 N. H. 278.

over them, and is not responsible for the faithful discharge of their duties.¹ Directors are not entitled to extra pay for services rendered in the discharge of official duty.² Thus, a director of a bank was prevented from receiving a reward offered by the bank for the recovery of stolen property, because he only did his duty in endeavoring to recover it;³ and it is his duty, if he obtains information which will in any manner lead to the detection of the thief, to communicate the facts promptly to the bank.⁴ A resolution formally adopted allowing directors compensation for attendance on courts was held insufficient to give a director a right to recover therefor.⁵ And where a vote was adopted by the directors to pay the chairman of a committee on short loans two hundred dollars for services already rendered in his official capacity, it was held that the services created no debt. The court said: "Although the director did the work faithfully, his labors fell within the limits of his duty as a director, and the fact that he performed them with an exuberance of good faith, imposed upon the corporation no moral or legal obligation to pay for them."⁶ If remuneration for services was not intended by either party, the person rendering them cannot recover pay. A claim against an insurance company for the payment of a salary was put upon the ground of a vote fixing the salary of a previous president of the company by name, and the subsequent election of the claimant to the same office. It was held that proof that the need of the constant and active

¹ *Anthony v. Adams*, 1 Metc. 284; *Stetson v. Kempton*, 13 Mass. 272; *Parsons v. Goshen*, 11 Pick. 396; *Martin v. Mayor of Brooklyn*, 1 Hill, 545, 551; *Wadsworth v. Henniker*, 25 N. H. 189; *Gove v. Epping*, 41 Id. 539; *Merrill v. Plainfield*, 45 Id. 126.

² *Maux Ferry Gravel R. Co. v. Brangan*, 40 Ind. 361; *Am. Cent. R.R. Co. v. Miles*, 52 Ill. 174.

³ *Collins v. Godfrey*, 1 Barn. & Ald. 590.

⁴ *Stacy v. State Bank of Ill.*, 4 Scam. 91.

⁵ *Dunstan v. Imperial Gas Light Co.*, 3 Barn. & Ald. 125.

⁶ *Loan Assoc. v. Stonemetz*, 29 Pa. St. 534. See *N. Y. & New Haven R.R. Co. v. Ketchum*, 27 Conn. 170.

services of a president had terminated, that the business was wound up, or nearly so, and that the avowed purpose of electing a president was to preserve a corporate organization in order to bring the business to a close, was competent evidence to rebut the presumption of an agreement to pay a salary; and that the declarations of the claimant, made from time to time, that he was to receive no compensation, were also admissible to show that at the time of his election it was understood by the parties that the salary voted to the president when the company was in full operation, was not to be continued to him.¹ A director rendered extraordinary services in behalf of a corporation, but never presented any account, or made any claim for compensation; and, as there was no express contract on the part of the corporation to pay him anything, it was held that under the circumstances, none could be implied.² A clergyman contracted with a vestry *de facto*, for a year's service, which he rendered, not knowing that the members of the vestry were not legally elected. But the next year, having been apprised of the fact, he entered into another contract with the same vestry. It was held that he was not entitled to payment for services rendered by him the second year.³ Where the secretary and treasurer of the vestry and wardens of a church had never asked pay for his services, and the church books which he kept showed that the thanks of the vestry had been voted to him for his gratuitous and able management of the church funds, it was held that he could not afterward make any charge.⁴ Although where the act requires the corporation to appoint a clerk or secretary, and its record shows that he has been appointed without any

¹ Com. Ins. Co. v. Crane, 6 Metc. 64. First Nat. Bank v. Drake, 29 Kansas, 311.
See Holland v. Lewiston Falls Bank, 52 Me. 564.

² Utica Ins. Co. v. Bloodgood, 4 Des. Ch. 578.

³ Wend. 652. See State v. People's Mut. Benefit Assoc., 42 Ohio St. 579; ⁴ Christ Church v. Barksdale, 1 Strobb. Eq. 197.

express contract in relation to a salary, he can usually recover the value of his services;¹ yet liability on the part of the corporation in such case may be rebutted by proof that by the usage and custom of the corporation, no compensation is chargeable for such services, and his position as a member and officer of the corporation will be sufficient *prima facie* to charge him with knowledge of the custom.² A person employed as the secretary of a private corporation at a fixed rate of compensation cannot demand extra pay for services in that capacity which were not anticipated at the time of his appointment, or not alluded to in the charter or by-laws.³ The power conferred upon a corporation to fix the compensation of all of its officers does not necessarily carry with it the right to take away or affect fees allowed by the charter to an officer.⁴ The cashier of a bank has no lien upon the funds in the bank for his salary.⁵

§ 132. **Service of process.**—Corporations, being allowed to sue and be sued, necessarily possess power to perform through their agents services incident to the commencement or prosecution of suits.⁶ When there are no statutory regulations on the subject, the president or head officer of a corporation is the proper person on whom process against the corporation should be served.⁷ Where service of a bill in equity upon a corporation was acknowledged by a person as attorney for the corporation at the request of its president, but the president had no authority to accept service of legal process or to appoint attorneys, and the

¹ Waller v. Bank of Kentucky, 3 J. J. Marsh, 201; Bill v. Dareuth Valley R. Co., 37 Eng. L. & Eq. 539.

² Fraylor v. Sonora Mining Co., 17 Cal. 594.

³ Carr v. Chartiers Coal Co., 25 Pa. St. 337.

⁴ Carr v. St. Louis, 9 Mo. 190.

⁵ Bruyn v. Receiver, etc., 9 Cowen, 413, *note*.

⁶ Planters' and Merchants' Bank of Mobile v. Andrews, 8 Porter, 404.

⁷ Chamberlin v. Mammoth Mining Co., 20 Mo. 96; McCall v. Byram Manf. Co., 6 Conn. 428; Boyd v. Chesapeake, etc., Canal Co., 17 Md. 195.

corporation was in the habit of making such appointments only by vote of the directors, it was held that the service was not good.¹

§ 133. **Who may bring action.**—Where a contract is made with the agent of a corporation for the benefit of the latter, it is its contract, and an action may be brought on it in the name of the corporation.² In the absence of proof it will not be presumed that the president of a corporation was authorized to bring an action in its name.³ A statute having directed that all actions should be brought in the name of the treasurer, at the time an order was made for bringing an action, A. was treasurer, but when the action was commenced B. filled the office. It was held that the latter was authorized to prosecute the action in his name, and entitled to recover what was due before he was appointed treasurer.⁴ An insurance broker who, for the purpose of discharging the duties of his agency, has taken rights upon property, and received from the insurance company an open policy “to himself or whom it may concern,” may, in case of a loss embraced in the policy, maintain an action for the use of the owner, notwithstanding the latter is not mentioned in the policy, if the insurance was effected for his benefit.⁵ The officers, though chosen by vote of the stockholders, are not their agents, but the agents of the corporation, and they are accountable to it alone. Therefore one or more of the stockholders cannot maintain an action at law against the officers for any breach of official duty that injures the corporate property as a whole. An injury done by the

¹ Bridgeport Savings Bank v. Eldredge, 28 Conn. 556.

² Commercial Bank v. French, 21 Pick. 486; Trustees v. Levant, 10 Me. 441; Garland v. Reynolds, 20 Id. 45; Southern Life Ins., etc., Co. v. Gray, 3 Fairf. (12 Me.) 262; Irish v. Webster, 5 Me. 144.

³ Ashuelot Manf. Co. v. Marsh, 1

Cush. 507. But see Alexandria Canal Co. v. Swann, 5 How. 83.

⁴ Curtis v. Kent Waterworks, 7 Barn. & Cress. 314.

⁵ Protection Ins. Co. v. Wilson, 6 Ohio St. 553. See Goodell v. New England Mut. Fire Ins. Co., 25 N. H. (5 Fost.) 169; Binney v. Plumley, 5 Vt. 500.

directors of a company to an individual, by inducing him to become a member of the company by means of false representations, is actionable, because it is an injury to him and not to the company. But the interest of stockholders is merely a qualified and equitable interest. The corporation may call its officers to account if they wilfully abuse their trust or misapply the funds of the company; and if it refuses to sue, or is still under the control of those who must be made defendants in the suit, the stockholders, who are the real parties in interest, may file a bill in their own names, making the corporation a party defendant, or part of them may file a bill in behalf of themselves and all others standing in the same relation.¹

§ 134. **Statute of limitations.**—The limitation of actions in case of default on the part of the cashier of a bank, begins to run not from the time funds were actually withdrawn, but from the time the officer neglected to pay them over pursuant to his bond.² The test of the running of the statute of limitations is the liability of the party, invoking its bar to the service of process during the whole of the period prescribed. If there is a continuous liability, the residence or domicile of the party is immaterial. When a foreign corporation has a known place of business, and an agent in the State, the statute of limitations is as available

¹ Peabody v. Flint, 6 Allen, 52, per CHAPMAN, J., referring to Smith v. Hurd, 12 Metc. 371; Robinson v. Smith, 3 Paige Ch. 222 and cases cited. See Brown v. Vandyke, 4 Halst. Ch. 795; Forbes v. Memphis, etc., R.R. Co., 2 Woods, 323; Bronson v. La Crosse, etc., R.R. Co., 2 Wall. 283; Allen v. Curtis, 26 Conn. 456; Blackman v. Cent. R.R., etc., Co., 58 Ga. 189; Silk Manf. Co. v. Campbell, 3 Dutcher, 539. Some of several shareholders in a joint stock company may sue on behalf of themselves and the other shareholders to compel directors of the company

to refund moneys improperly withdrawn by them from the stock of the company and applied to their own use. Hickens v. Congreve, 4 Russ. 562. A person who has had his name removed from the register of shareholders of a company for variance between the memorandum and prospectus, is not entitled to file a bill for the purpose of compelling the directors personally to refund the deposit and calls, unless the directors have been guilty of fraud. Ship v. Crosskill, L. R. 10, Eq. 73.

² Bank of Wilmington v. Wollaston, 3 Har. Del. 90.

to it as if it were a domestic corporation or a natural person.¹ But a foreign corporation sued in New York cannot avail itself of the statute of limitations, although it has, before the commencement of the action for the time specified in the statute, continuously operated a railroad in the State, and had property and officers therein.²

§ 135. Notice to agent.—There can be no actual notice to a corporation aggregate except through its agents or officers. Notice to an individual corporator, if he be not constituted by the charter or by-laws an organ of communication between the corporation and those who deal with it, is not notice to the corporation, because any presumption that he had imparted the information to the corporate body would be rebutted by the fact that it was not his duty to do so.³ Knowledge of a director, acquired while he is not acting in an official capacity, that a note discounted by his bank before maturity is illegal, or without consideration, is not knowledge of the bank.⁴ Notice to a corporator of an incumbrance on property bought by the corporation will not charge the other corporators with whom he is associated.⁵ Where a note is discounted by the cashier of a bank, the fact that he is also a stockholder and director of a corporation which indorsed the note, will not make the bank chargeable with notice of equities against the paper.⁶ When an officer of a corporation is dealing with it in his own interest, and in opposition to that of the corporation, the latter is not chargeable with his knowledge not com-

¹ *Huss v. Cent. R.R. & Banking Co.*, 66 Ala. 472.

² *Thompson v. Tioga R.R. Co.*, 36 Barb. 79; *Olcott v. same*, 20 N. Y. 210; *Rathbun v. N. C. R.R. Co.*, 50 Id. 656; *Boardman v. Lake Shore, etc., R.R. Co.*, 84 Id. 157. See *Barr v. King*, 96 Pa. St. 485.

³ *Housatonic Bank v. Martin*, 1 Metc. 294; *Fairfield Savings Bank v. Chase*,

72 Me. 226. The holder of bank stock as collateral security is not bound by the knowledge of the officers of the bank. *Baker v. Woolston*, 27 Kans. 185.

⁴ *First Nat. Bank v. Christopher*, 40 N. J. 435.

⁵ *Burt v. Batavia Paper Manf. Co.*, 86 Ill. 66.

⁶ *First Nat. Bank of Rock Island v. Loyhed*, 28 Minn. 396.

municated of facts derogatory to his title.¹ But notice to an agent, who is bound as such agent to act upon the notice, or to apprise his principal of it, is legal notice to the principal; and this rule is applicable to corporations.² Where the charter, a by-law, or a custom has authorized the executive officers of a bank to act for it, they may bind it by their reception of notice, as well as by any other act within the scope of their power.³ Publication of the dissolution of a partnership in a newspaper which is taken and paid for at a bank by its officers, may not be constructive notice to the bank, though it has previously dealt with the firm; but when the fact of dissolution, gleaned from that or any other source, is announced by a director at a regular meeting of the board, and made the subject of conversation, it will be notice to the bank.⁴ Notice to the president

¹ *Barnes v. Trenton Gas Light Co.*, 27 N. J. Eq. 33; *Peckham v. Hendren*, 76 Ind. 47. See *Seneca County Bank v. Neass*, 5 Denio, 329; *Atlantic State Bank v. Savery*, 82 N. Y. 291; *Farmers', etc., Bank v. Payne*, 25 Conn. 444; *Wickersham v. Chicago Zinc Co.*, 18 Kansas, 481; *Mihill's Manf. Co. v. Camp*, 49 Wis. 130.

² *Fulton Bank v. N. Y. & Sharon Canal Co.*, 4 Paige Ch. 127; *Waynesville Nat. Bank v. Irons*, 8 Fed. Rep. 1. If an agent act for a bank in discounting a note, the bank is affected with his knowledge of fraud in the inception of the note. *Nat. Security Bank v. Cushman*, 121 Mass. 490. It is otherwise if the agent does not himself discount the paper, but it is done by the bank on his recommendation. *Shaw v. Clark*, 49 Mich. 384.

³ Notice to a moneyed corporation is good if given to the chief financial officer. *Port Jervis v. First Nat. Bank*, 96 N. Y. 550. Notice to the president of the corporation in relation to matters under his care, is notice to the

corporation. *Smith v. Board of Water Commrs.*, 38 Conn. 208. The same is true as to the treasurer, who is the managing agent. *New England Car Spring Co. v. Union India Rubber Co.*, 4 Blatchf. 1. Notice to the superintendent of a mine of its dangerous condition, is notice to the company. *Quincy Coal Co. v. Hood*, 77 Ill. 68. See *Mechanics' Bank v. Schaumburg*, 38 Mo. 228.

⁴ *Bank of Pittsburgh v. Whitehead*, 10 Watts, 397; *Bank of South Carolina v. Humphreys*, 1 McCord, 388. See *Martin v. Walton*, Ib. 16; *Green v. Merchants' Ins. Co.*, 10 Pick. 402. Where a note was made by a firm which was discounted by a bank for the accommodation of the payee, and there was no actual notice to the bank of the dissolution of the partnership, it was held that the mere taking of a new note, apparently drawn by the same persons, did not discharge the firm from liability for the previous debt. *Vernon v. Manhattan Co.*, 22 Wend. 183.

of a bank that certain stock in the bank was purchased with trust funds belonging to a married woman, but stands on the books of the bank in the name of her husband, is notice to the bank, and it is sufficient that the president was apprised of the facts in general terms, and thus put upon inquiry.¹ But notice to an officer, or knowledge not derived officially in the business of the corporation, cannot operate to the prejudice of the latter. The principal is chargeable with knowledge, for the reason that the agent is substituted in his place, and represents him in the particular transaction; and as this relation, strictly speaking, exists only while the agent is acting in the business thus delegated to him, it is properly limited to such occasions.² W., being possessed of a portion of the separate property of his wife, invested it in real estate, taking a deed for the same in his own name. A year later, W. and wife, by their joint deed, conveyed one-fourth part of the property to a third person for the wife's sole and separate use. This deed remained in W.'s possession, who neglected to have it recorded, and he thereafter mortgaged the same property to a railroad company, he being at the time its president, to secure the payment of an indebtedness of himself. It was held that, although W. was the president of the company when he executed the mortgage, knowledge which he had in regard to the rights and equities of his wife could not be taken as the knowledge of the company, unless it could be shown to have been communicated to it.³ The cashier of a bank being held out to the world as its general agent for the management of its notes and other securities, notice to him to sue the maker of a note held by the bank, is no-

¹ Porter v. Bank of Rutland, 19 Vt. 410.

² Bank of U. S. v. Davis, 2 Hill, 451.

³ Winchester v. Balt. & Susq. R.R. Co., 4 Md. 231. Unauthorized repre-

sentations made by the president of a corporation to an agent, and communicated by the agent to a third person, are not binding on the corporation. Hackney v. Alleghany County Mu. Ins. Co., 4 Pa. St. 185.

tice to the bank, especially if the notice is brought to the knowledge of the bank, and acted on by the president.¹ Where the indorser of a note which had been discounted by a bank went to the cashier, and told him the maker was about to remove his personal property, and requested the cashier to issue execution on the judgment which the bank had obtained against the maker, which the cashier refused to do, and said he would discharge the indorser and look to the maker, it was held binding on the bank.² Directors or trustees, when assembled as a board, are the general agents upon whom a notice may be served, and which will be binding upon their successors and the corporation. But notice to an individual director who has no duty to perform in relation to such notice, cannot be considered a notice to the corporation.³ Where a promissory note is discounted by a bank, the fact that the indorser of the note is one of the bank directors will not be deemed notice to the bank that the note was made for his accommodation.⁴ An en-

¹ Bank of St. Mary's v. Mumford, 6 Ga. 44; Trenton Banking Co. v. Woodruff, 1 Green Ch. 117.

² Westmoreland Bank v. Klingensmith, 7 Watts, 523.

³ Fulton Bank v. N. Y. & Sharon Canal Co., *supra*; Custer v. Tompkins County Bank, 9 Pa. St. 27; Genl. Ins. Co. v. U. Ins. Co., 10 Md. 517; U. S. Ins. Co. v. Shriver, 3 Md. Ch. 381.

⁴ Commercial Bank v. Cunningham, 24 Pick. 270. In Farmers' & Citizens' Bank v. Payne, 25 Conn. 444, a suit was brought by the indorsees of bills of exchange against the acceptor, in which it appeared that the bills were drawn in favor of one G., and accepted by the defendant, for the sole accommodation of G., and for the purpose of enabling him to pay with their avails certain other bills of exchange which had been previously drawn and accepted in his favor by the same parties, and for his

accommodation, and negotiated by him; that the bills in suit were discounted by the plaintiff's bank for G.'s benefit, and the avails fraudulently appropriated by him for another purpose; and that when they were so drawn and accepted, and until after they were discounted and indorsed to the plaintiffs, G. was a director of the bank; but that he was not present with the board of directors when they were discounted, and had never communicated to them, or to any of the officers or agents of the bank, his knowledge of the purpose for which the bills were made. On the claim of the defendant that the plaintiffs were not *bona fide* holders of the bills by reason of the knowledge of such director, it was held that his knowledge could not be imputed to the plaintiffs. Followed in Farrell Foundry v. Dart, 26 Conn. 376.

gineer was appointed by a company to superintend the construction of a bridge during its entire progress, and to give, from time to time, all necessary directions in relation to it. The builders proposed to the engineer an alteration supposed by them to be an improvement, which was made with his knowledge. Notice of the alteration to the engineer was held notice to the company.¹ Where, in cases of insurance, the notice of loss and the preliminary proofs are required to be sent to the secretary of the company, he must be considered as its agent, clothed with full authority to act for it in acknowledging receipt of the notice, and judging of its sufficiency.² If an agent be employed by an insurance company to solicit risks and negotiate contracts for the company with any one who may wish to insure, verbal notice to him of a prior insurance on the same property, is notice to the company.³ But a conversation about an intention to effect a subsequent insurance in presence of an agent of the company does not constitute notice of such subsequent insurance.⁴ A condition of a policy of insurance was that the policy should be void if the insured went beyond the limits of Europe without the permission of the directors. The insured having emigrated to Canada, the agent of the company, with knowledge of the breach of the condition, continued to receive the usual premiums upon the policy, representing that if they were regularly paid the policy would be perfectly good. It was held that notice of the breach of the condition to the agent was notice to the company, and that the latter could not insist upon a forfeiture after the death of the insured.⁵ Where a corporation has several agents who have separate and distinct

¹ Danville Bridge Co. v. Pomeroy, 15 Pa. St. 151.

² Troy Fire Ins. Co. v. Carpenter, 4 Wis. 20.

³ McEwen v. Montgomery County Mu. Ins. Co., 5 Hill, 101.

⁴ Schenck v. Mercer County Mu. Fire Ins. Co., 4 Zab. 447.

⁵ Wing v. Harvey, 27 Eng. L. & Eq. 140; 18 Jur. 394; 23 L. J. Ch. 511;

5 De G. M. & G. 265.

duties, notice to one in relation to a matter not connected with his duties cannot affect the corporation.¹ If the agent of a corporation is authorized to procure loans of money from banks and individuals on notes of the corporation made by him, on drafts drawn by him, and on notes and drafts payable to the corporation and indorsed by him, notices given to him on such paper will bind the corporation, and he may waive the right to require notice, and render the conditional liability absolute, although he at the same time acts as the agent of the maker.²

Upon the question whether a principal is bound by knowledge or notice which the agent had previous to his employment in the service of the principal, there is a conflict of authority. In a late case in Pennsylvania, it was said that "notice to an agent twenty-four hours before the relation commenced is no more notice than twenty-four hours after it ceased would be."³ On the other hand, in Maine the rule has been adopted that the knowledge of an agent obtained prior to his employment, will be an implied or imputed notice to the principal under the following limitations and conditions: "The knowledge must be present to the mind of the agent when acting for the principal,—so fully in his mind that it could not have been at the time forgotten by him; the knowledge or notice must be of a matter so material to the transaction as to make it the agent's duty to communicate the fact to the principal; and the agent must himself have no personal interest in the matter which would lead him to conceal his knowledge from his principal, but he must be at liberty to communicate it."⁴

§ 136. Acts and declarations of officers and agents.—The agent's statements made at the time of, or in the business

¹ *Goodloe v. Godley*, 13 Smed. & Marsh, 233.

² *Whitney v. South Paris Manf. Co.*, 39 Me. 316.

³ *Houseman v. Building Assoc.*, 81 Pa. St. 256.

⁴ *Fairfield Savings Bank v. Chase*, 72 Me. 226, per PETERS, J.

which he transacts under the power, are included in his acts; his declarations being a part of the *res gestæ*, and binding his principal equally with the act to which they refer.¹ The knowledge, intentions, and purposes of a corporation can generally only be known by the assertions and conduct of its directors and other principal agents while in the discharge of their duties. As a rule, what the directors know regarding matters affecting the corporate interests, the corporation is supposed to know.² In an action of ejectment to recover land claimed by a religious corporation, it was held that the acts and declarations of the trustees of the corporation while transacting its business, and also what passed at meetings of the corporation when assembled on business, might be proved to show the possession of the land and the extent of the claim of the corporation; on the ground that the acts of corporate agents, and even of bodies corporate, may be established independently of written minutes of their proceedings.³ To render the acts and declarations of an officer of a corporation admissible in evidence, there must be some proof as to his duty and power, and that they were made within the scope of his authority.⁴ A corporation is not bound by the reports of its officers made to the stockholders, in which certain claims for which the corporation is not holden are estimated

¹ Northrup v. Miss. Valley Ins. Co., 47 Mo. 435; Western Boatmen's Ben-
nev. Assoc. v. Kribben, 48 Id. 37; Morris & Essex R.R. Co. v. Green, 15 N. J. Eq. (2 McCarter) 469. "I authorize a man to borrow a sum of money for me. The power being limited, he has no authority to borrow for himself or a neighbor. He goes to the lender and borrows in my name, showing him a written power, and declaring at the same time that he takes the loan on my account. Both his acts and declarations are evidence against me." But a party dealing with an agent is

bound to inspect the power when in writing, or to learn its language the best way he can when it is by parol. Upon becoming acquainted with it, he will be deemed to understand its legal effect, and must see at his peril that the agent does not transgress the prescribed boundary in acting under it. North River Bank v. Aymar, 3 Hill, 262.

² Farmers' Bank v. McKee, 2 Pa. St. 318.

³ Magill v. Kauffman, 4 Serg. & Rawle, 317.

⁴ Spalding v. Bank of Susquehanna County, 9 Pa. St. 28.

as corporate liabilities.¹ An admission of indebtedness on a contract is beyond the scope of the authority of the treasurer, and is the mere declaration of a third person which will not affect the corporation.² The declarations of the president of a bank of its liability are not admissible against it. An indebtedness of a corporation cannot be created by the mere admissions of its president any more than its rights can be released or annulled by his unauthorized directions.³ The general duty of the treasurer of a private corporation does not extend so far as to allow him to settle and audit disputed claims brought for salaries by other agents of similar grade, and to issue written admissions of his determination binding on the corporation. Such duties would regularly fall on the board of directors.⁴ Where a person undertook to establish the fact of his engagement as an agent of a corporation from the declarations of the president of the board of managers, from those of one of the members of the board, and from those of the superintendent made separately and on different occasions, without showing that any corporate action was taken by the board by virtue of which he was employed, or by which the power to employ him was delegated to any member of the board or to the superintendent, it was held that the proof was insufficient.⁵ The cashier of a bank possesses no incidental authority to make any declarations binding on the bank not within the scope of his ordinary duties. If, for instance, he should promise to pay a debt which the corporation did not owe and was not liable to pay, or should admit that forged bills of the bank were genuine, the bank would not be bound by such promise or admission, unless

¹ Hall v. Mobile & Montgomery R.R. Co., 58 Ala. 10.

² Tripp v. New Metallic Packing Co., 137 Mass. 499.

³ Spyker v. Spence, 8 Ala. 333; Hen-

ry & Co. v. Northern Bank of Ala., 63 Id. 527.

⁴ Kalamazoo Novelty Manf. Co. v. McAlister, 36 Mich. 327.

⁵ Allegheny County Workhouse v. Moore, 95 Pa. St. 408.

it had authorized or adopted the act.¹ A new bank having been chartered by the same name as a previous one, employed the same president and cashier. The new corporation put in circulation the notes of the old one, the cashier asserting that there was no difference between the notes of the old and new corporation; and upon the faith of this declaration the notes obtained circulation. It was held that the officers who had thus undertaken to pledge the credit of the bank had acted unwarrantably, and could not bind the stockholders, who must be supposed to have relied upon the faithful and correct discharge of duty by their agents and servants. The court remarked that the stockholders would be in an extremely unsafe situation if their property were bound by the irregular transactions or declarations and confessions of their officers beyond the sphere of their duties.² Where a person permits himself to be held out to the world as president of a bank which has in fact no legal being, he will be chargeable with constructive notice of the management of its affairs by the pretended cashier and other subordinate officers, and, upon slight proof of a fraudulent combination, the acts and declarations of each in promoting its success will be allowed to go to the jury, who are to determine the existence of the combination and its nature.³ Neither the president nor cashier, nor both combined, can, *virtute officii*, release a debt or liability in behalf of the bank, or bind the bank by an admission that the maker of a promissory note given by him to the bank is not legally responsible thereon.⁴ Where the cashier and one of the directors of a bank, having been asked by the indorsers of a note discounted by the bank

¹ Merchants' Bank v. Marine Bank, 3 Gill, 96.

² Wyman v. Hallowell & Augusta Bank, 14 Mass. 58. See State v. Com. Bank of Manchester, 14 Miss. (6 Smed. & Marsh) 218.

³ Hauser v. Tate, 85 N. C. 81.

⁴ Hodge v. First Nat. Bank, 22 Gratt. 51; Bank of U. S. v. Dunn, 6 Pet. 51; U. S. v. City Bank of Columbus, 21 How. 356.

for the accommodation of the drawer, whether it would be safe for them to indorse, replied in the affirmative, and that the drawer was perfectly good, it was held that the bank was not bound thereby ; such a declaration, even if it were wilfully false, not made by the officers or agents of the bank in the course of their duties, not affecting the principal.¹ The defendants, a railroad company, advertised that they would receive proposals, until a specified day, for doing certain work on the line of their railroad. The plaintiff submitted proposals to the defendants for doing the work, and entered into a written contract to perform the same. On a subsequent day the directors of the company held a meeting, when, for want of time to examine the proposals of the different parties, a resolution was passed and entered in the record of the proceedings, that "such proposals be referred to the executive committee and superintendent to close a contract with such of the persons making the proposals, and upon such terms as they shall consider most advantageous to the interests of the company." It was not proved that the executive committee and superintendent ever met or acted upon the proposals. It was held that the declarations of individual directors, immediately upon the adjournment of the meeting referred to, that the proposals of the plaintiff were accepted, were not binding on the company, it not appearing that such declarations were within the scope of the ordinary powers of a director and the books of the company being the best evidence of what was done by the directors at the meeting.² It is scarcely necessary to say that the declarations of individual corporators made when they are not acting as the agents of the corporation, cannot be shown against the corporation ;³ nor those of an officer

¹ *Mapes v. Second Nat. Bank*, 80 Pa. St. 163.

² *Soper v. Buffalo & Rochester R.R. Co.*, 19 Barb. 310.

³ *Polleys v. Ocean Ins. Co.*, 14 Me. 141 ; *Ruby v. Abyssinian Soc.*, 15 Id.

or director under similar circumstances.¹ Where a party dealing with an agent has ascertained that the act of the agent corresponds with the power in every particular in regard to which such party has, or is presumed to have, any knowledge, he may take the representation of the agent as to any extrinsic fact which rests peculiarly within the knowledge of the agent, and which cannot be ascertained by a comparison of the power with the act done under it.²

¹ *Hartford Bank v. Hart*, 3 Day, 491; *Nat. Bank v. Norton*, 1 Hill, 572; *Seibrecht v. New Orleans*, 12 La. Ann. 496; *Underhill v. Gibson*, 2 N. H. 352; *Washington Bank v. Lewis*, 22 Pick. 24; *Stoystown, etc., Turnp. Co. v. Craver*, 45 Pa. St. 386; *East River Bank v. Hoyt*, 41 Barb. 441; *Grayville & Mattoon R.R. Co. v. Burns*, 92 Ill. 302. Declarations or statements of individual directors when the board is not in session, and when such declarations or admissions do not accompany any official act, and statements made in discussion while the board is in session, are not competent to prove a contract. *Peek v. Detroit Novelty Works*, 29 Mich. 313. See *Imboden v. Etowah Battle Branch, etc., Mining Co.*, 70 Ga. 86; *Coyle v. Balt. & Ohio R.R. Co.*, 11 W. Va. 94; *Smith v. Woodville Consolidated Silver Mining Co.*, 66 Cal. 398.

² *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 125, approving *North River Bank v. Aymar*, 3 Hill, 262. "The familiar case of the giving of a negotiable partnership note by one of the partners for his own individual benefit affords an apt illustration of this rule. Each partner is the agent of the partnership as to all matters within the scope of the partnership business, and can bind the firm by making, indorsing, and accepting bills and notes in such business; but he has no more authority than a

stranger to execute such paper in his own business or for the accommodation of others. If he gives the partnership note or acceptance for his own debt, it is void in the hands of any party having knowledge of the consideration for which it is given; but, when negotiated to a *bona fide* holder, the firm is precluded from questioning the authority of the partner, and is effectually bound. . . . Every person taking the negotiable note or acceptance of a partnership executed by one of the partners in the name of the firm, is bound to know the extent of the partner's authority to bind the firm, but this obligation does not extend to the consideration for which the note or acceptance was given. If given for the private debts of one of the partners, or for the accommodation of third persons, all the cases agree that the burden of proving the holder's knowledge of that fact rests upon the partnership. That the execution is by an agent is as apparent upon the face of the paper in such cases, as in that of a certified check; because a partnership can only act in its partnership name through agents. The argument resorted to here, therefore, that parties are only bound by the authorized acts of their agents, and that paper issued by an agent without authority is no more obligatory upon the principal than if it had been forged, is just as applicable to partnership notes given by a

As a rule, the declarations of an agent are admissible as against the principal only when made while transacting the business of the principal, and as a part of the transaction then depending.¹ In an action by a passenger against a railroad company for the loss of his trunk, the admission of the conductor, baggage-master, or station-master, as to the manner of the loss, made the next morning in answer to inquiries for the trunk, are competent against the company, it being part of the duties of such agents to deliver the baggage of passengers, and to account for the same if missing when inquiry is made in a reasonable time.² But in an action against a railroad company for damages by a collision through the alleged negligence of the engineer, his statements in relation to the accident made a few days afterward, were held not admissible against the company.³ Statements of the draw-tenders of a bridge made while actually engaged in opening and keeping open the draw for the passage of vessels, to the masters of such vessels, that the draw-tenders would prefer that vessels should sail through rather than be hauled through, were admitted against the company.⁴ The declarations of the cashier of a bank that stock which stood on the books of a bank in the name of certain persons was a trust fund, were held admis-

partner for his individual debts as these certified checks. The question is not in such cases whether the principal is bound by the unauthorized act of the agent, but whether he is estopped by the representation of the agent from disputing facts which show that the act was authorized." *Ibid.*, per SELDEN, J. COMSTOCK, J., dissenting.

¹ *Ladd v. Couzins*, 35 Mo. 516; *McDermott v. Hannibal & St. Joseph R.R. Co.*, 73 Id. 516; *Adams v. same*, 74 Id. 553; *Stiles v. Western R.R. Corp.*, 8 Metc. 44; *Sweatland v. Ill. & Miss. Tel. Co.*, 27 Iowa, 433.

² *Morse v. Conn. River R.R. Co.*, 6

Gray, 450; *Lane v. Boston & Alb. R.R. Co.*, 112 Mass. 455.

³ *Robinson v. Fitchburg, etc., R.R. Co.*, 7 Gray, 92.

⁴ *Toll Bridge Co. v. Betsworth*, 30 Conn. 380. The admission of a superintendent of a street railroad company of an assault made upon a passenger by a driver, and justifying it, was held admissible against the corporation. *Malecek v. Tower Grove & Lafayette R.R. Co.*, 57 Mo. 17. So the admission of the superintendent of a manufacturing company that a nuisance existed, and required to be and should be attended to. *McGenness v. Adriatic*

sible in evidence to charge the bank with knowledge of the fact.¹

Anything in the nature of narrative is to be carefully excluded.² To be admissible, the proof must be in the nature of original and not of hearsay evidence; it must constitute the fact to be proved, and must not be the mere admission of some other fact.³ In an action by a railroad company for running over and killing the plaintiff's husband, the plaintiff was permitted to prove that after the deceased was struck and the train stopped, two of the train men, whom the witness supposed were the fireman and engineer, came up, and one of them said to the other: "If you had stopped the train when I told you, you would not have killed him." Held error.⁴ In an action to recover damages for personal injury, although the injured person testifies at the trial, the exclamations of pain made by such person at the time of the occurrence may be proved and used to corroborate other evidence, and to give a more particular or vivid description of his condition.⁵

The books and records of a corporation are *prima facie* evidence against it as admissions. But a corporation can only be bound conclusively by its records, either when they are such, duly made by the recording officer of its proceedings, or when some person, who has had proper access to them or knowledge of them, has become aware of their contents and has acted upon the faith that they were the records of its proceedings.⁶

Mills, 116 Mass. 117. But the declaration of the superintendent of a mine to one of the miners that every ton of ore they got out cost a little over five dollars a ton to mine, was held not admissible against the company. Hanover Water Company v. Ashland Iron Co., 84 Pa. St. 279.

¹ Harrisburg Bank v. Tyler, 3 Watts & Serg. 373.

² Bacon v. Inhabs. of Charlton, 7 Cush. 588.

³ Luby v. Hudson River R.R. Co., 17 N. Y. 133. See Oregon Steamship Co. v. Otis, 100 N. Y. 446; Learned v. Tillotson, 97 Id. 1.

⁴ Adams v. Hannibal & St. Joseph R.R. Co., *supra*.

⁵ Hogenlocher v. Coney Island, etc., R.R. Co., 99 N. Y. 136.

⁶ Holden v. Hoyt, 134 Mass. 181.

· § 137. **Agency not restricted to place.**—A corporation may carry on its business in a foreign State by its agents; the presumption being, in the absence of any prohibition to the contrary, that the corporation of one State may exercise within any other State the general powers conferred by its charter.¹ Although corporations cannot migrate from one sovereignty into another so as to become legal local existences within the latter, yet the migration of the directors of a corporation from one sovereignty into another does not terminate the existence of the corporation within the sovereignty which created it. Corporations created in one State are permitted to contract and sue in other States, and as all of the directors might contract there, they can authorize it to be done by their agent. The mere place where the agents of a corporation enter into a contract must in general be immaterial. The important question is one of power. The exercise of the power has relation to the place of their legal establishment where the contract may be subsequently acted under.² The transaction of business by the corporation in another State appearing, a certificate of service by the proper officer, on a person who is its agent there, would be *prima facie* evidence that the agent represented the company in the business.³ The directors of a manufacturing company, the charter of which contains no restriction as to the place of holding meetings, may appoint a secretary at a meeting held out of the State.⁴

¹ Christian Union v. Yount, 101 U. S. 352; Bank of Augusta v. Earle, 13 Pet. 519; Galveston R.R. v. Cowdrey, 11 Wall. 459; Leasure v. Union Mut. Life Ins. Co., 91 Pa. St. 491; Wood Hydraulic Hose Min. Co. v. King, 45 Ga. 34; Dodge v. Council Bluffs, 57 Iowa, 560; Cowell v. Springs Co., 100 U. S. 55; Doyle v. Continental Ins. Co., 94 Id. 535; Home Ins. Co. v. Davis, 29 Mich. 238,

² Wright v. Bundy, 11 Ind. 398; Humphreys v. Mooney, 5 Col. 282; Hillyer v. Burlington, etc., R.R. Co., 70 N. Y. 223; Pope v. Terre Haute Car Manf. Co., 87 Id. 137.

³ St. Clair v. Cox, 106 U. S. 350. See Const. of Ala., art. 14, sec. 4.

⁴ McCall v. Byram Manf. Co., 6 Conn. 428.

CHAPTER IX.

RIGHTS, POWERS, AND DISABILITIES OF CORPORATIONS IN GENERAL.

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| <p>§ 138. Construction of charter.
 139. Inviolability of charter.
 140. Conditional grant.
 141. Where the grant is without consideration.
 142. Police regulations.
 143. Release from obligations.
 144. Right to enact changes in methods of legal procedure.
 145. Amendment of charter by consent of corporation.
 146. Reservation by State of power over corporations.
 147. Restricted to authority conferred by charter.</p> | <p>§ 148. When corporate power presumed.
 149. Power with reference to place of creation.
 150. Rights and powers of foreign corporations.
 151. Amalgamation.
 152. Meaning of consolidation.
 153. Power to consolidate.
 154. Effect of consolidation in general.
 155. Effect of consolidation in respect to creditors.
 156. Consolidation of corporations created by different States.</p> |
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§ 138. **Construction of charter.**—A charter, like a contract between individuals, is to be construed according to its spirit and meaning, as well as its letter;¹ the parties to it being primarily the State, and the corporators or stockholders including those by whom the affairs of the corporation are managed and controlled.² Whether a duty im-

¹ *White v. Syracuse & Utica R.R. Co.*, 14 Barb. 559; *Brady v. Brooklyn*, 1 Id. 584. "We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule to be applicable to all

statutes that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." *Thomas v. R.R. Co.*, 101 U. S. 71, per MILLER, J.

² *Northern R.R. Co. v. Miller*, 10 Barb. 260; *Bray v. Farwell*, 81 N. Y.

posed by law is merely directory, or essential to the enjoyment of some of the corporate rights, must be determined by its nature and object, by the public convenience, and by what may be understood to have been the intention of the legislature.¹ The natural construction of a charter is that all the privileges conferred, all the duties declared, and all the burdens imposed relate to the corporation as a whole, and not to the individuals composing it. The contrary may be enacted, but it ought to be clearly done before the incorporators as natural persons can be affected.² All the parts of the act should, if possible, be made subservient to, and in harmony with, the leading purposes and objects intended to be accomplished, and for which the corporation is created. To effect this, the whole must be considered and construed together, with direct reference to those purposes and objects, and all its minor and incidental provisions be so employed as to promote them. To dissect it into parts, and seize upon isolated expressions upon which to ingraft independent powers not in harmony with or necessary to attain the main design, would, in almost every case, defeat the intention of the legislature.³ This intention is sometimes to be collected from the cause or necessity of making the statute, and sometimes from other circumstances, and must be followed, though apparently

600; *Flint, etc., Plank R. Co. v. Woodhull*, 25 Mich. 99; *Bergman v. St. Paul Mut. Building Assoc.*, 29 Minn. 275.

¹ *Bank of U. S. v. Dandridge*, 12 Wheat. 64; *Middle Bridge Props. v. Brooks*, 13 Me. 391.

² *Atty. Genl. v. Bank of Newbern*, 1 Dev. & Batt. Eq. 216.

³ *Strauss v. Eagle Ins. Co.*, 5 Ohio St. 59. "A corporation to attain its legitimate objects may deal precisely as an individual may who seeks to accomplish the same ends. If chartered for the purpose of building a bridge it

may contract a debt for the labor, the materials, or the land upon which the bridge is abutted. If more advantageous, it may borrow money to purchase such land or materials or to pay for such labor. And as evidence of such indebtedness and as security for its repayment, it may execute to the creditor a promissory note, a bond, or a mortgage, whether the debt be for the money borrowed, or for the work, materials, or land." *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. 280.

contrary to the letter of the statute. "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers."¹

The language of the charter should in general neither be construed strictly nor liberally, but according to the fair and natural import of it with reference to the purposes and objects of the corporation.² Where a bank was prohibited by its charter from dealing in goods, wares, and merchandise, excepting to secure a debt due the bank incurred in the regular transaction of its business, it was held that the phrase "deal in" must be construed to mean the buying and selling for gain, and also the taking of goods to sell on commission.³ A charter having provided that the corporation might acquire and hold estate, real, personal, and mixed, and the same buy, exchange, sell, mortgage, transfer, pledge, or otherwise incumber or alienate, as the board of directors might deem expedient, it was held to entitle the corporation to loan its surplus funds.⁴ But an act of incorporation which gives a company power to make loans "upon such terms, and for such commissions, in addition

¹ THOMPSON, C. J., in *People v. Utica Ins. Co.*, 15 Johns. 358. "A doubtful charter does not exist, because whatever is doubtful is decisively against the corporation." BLACK, C. J., in *Com. v. Erie & Northeast R.R. Co.*, 27 Pa. St. 339. See *Wilmarth v. Crawford*, 10 Wend. 342; *Old Colony R.R. Co. v. Evans*, 6 Gray, 25; *Union Bank v. Jacobs*, 6 Humph. Tenn. 525; *Ohio Life Ins. Co. v. Merchants' Ins. Co.*, 11 Id. 1; *McKiernan v. Lenzen*, 56 Cal. 61; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *New York, etc., v. Kip*, 46 N. Y. 546; *Babcock v. N. J. Stock Yard Co.*, 20 N. J. Eq. 296; *Thompson v. Androscoggin Improvement Co.*, 58 N. Y. 108.

² A reasonable construction must be given to the charter. Therefore the grant of a right to take tolls for logs floated "across" a stream, must be deemed to mean with the descending current. *Bennet's Appeal*, 65 Pa. St. 242. See *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326; *First Nat. Bank v. Exchange Bank*, 92 U. S. 122; *Wendel v. State*, 62 Wis. 300; *Western Cottage Organ Co. v. Reddish*, 51 Iowa, 55; *Wells v. Northern Pacific R.R. Co.*, 23 Fed. Rep. 469; *Little v. Bowers*, 46 N. J. 300; *People v. Cheeseman*, 7 Col. 376.

³ *Bates v. Bank of the State*, 2 Ala. 451.

⁴ *Western Boatmen's Assoc. v. Kribben*, 48 Mo. 37.

to interest, as shall be stipulated by and between the said company and the parties receiving the loan or advance," does not authorize the company to take usury.¹ An action was brought and an injunction obtained to restrain a corporation from selling shares of stock under an assessment made by the trustees of the corporation. It appeared that the corporation was created to buy, improve, lease, sell, and otherwise dispose of real estate; also to build water-front protection, slips, docks, piers, wharves, warehouses, and otherwise improve such property as might be obtained by the corporation; that the corporation purchased and owned a tract of land, and that a railroad company was engaged in constructing a railroad to a point in the vicinity of the defendant's property; that an agreement was entered into between the defendant and the railroad company, whereby the latter bound itself within a stipulated period to increase the width of its track, and the frequency of the trips of its cars, to reduce the fare one-half, and to maintain these conditions ten years; that the defendant agreed to pay the railroad company, as a consideration for these concessions, twenty thousand dollars; and that the assessment in question was levied by the trustees on the stock of the corporation for the purpose of raising a fund with which to pay this sum. The railroad did not terminate upon or touch any portion of the property of the defendant, but it was proved that the increased facilities of travel over the railroad resulting from the contract had already greatly enhanced the value of the defendant's property, and were likely to enhance it more largely in the future. The

¹ Caldwell v. Com. Warehouse Co., 4 Thompson & Cook, 179; 1 Hun, 718. See Johnson v. Griffin Banking Co., 55 Ga. 691. Where the charter of a savings institution provided that its funds should be invested in or loaned on public stocks or private mortgages, and that when loaned on such stocks or

mortgages a sufficient bond or other satisfactory personal security in addition should be required, it was held that the loan on the promissory note of the borrower secured by bank stock was lawful. Mott v. U. S. Trust Co., 19 Barb. 568.

plaintiffs insisted that the defendant under its act of incorporation had no power to expend the money of the corporation for such a purpose, and that the assessment was therefore void. On the other hand, the defendant contended that the chief object of the corporation was to buy and sell real estate on speculation, and that with a view to that end, it was expressly authorized to "improve" its real estate so as to enhance its value, and that, upon a fair construction of the word "improve," as used in the charter, it must be held to include every act the direct and immediate tendency of which was to materially benefit or enhance the value of the property. The plaintiffs argued that the word "improve" could include nothing but acts performed on the land itself; such as the erection of buildings, the construction of roads across it, and other acts of a like nature. The court remarked that the only difficulty in the case resulted from the peculiar nature of the corporation, and the very novel objects for which it was formed, but that, in view of its evident purpose and design, the plaintiffs' construction was too narrow, that the term "improve," as here used, was employed in its more liberal sense, and included the performance of any act, whether on or off the land, the direct and proximate tendency of which was to enhance its value in the market. The judgment was therefore reversed, and the cause remanded, with an order to the court below to dissolve the injunction and dismiss the action.¹ The charter of a railroad company authorized the construction of a railroad between the cities of New York and Philadelphia, and made it the duty of the company to provide suitable vessels at either extremity of the road, for the transportation of passengers and goods from city to city. The company was permitted to demand and receive such sums of money for tolls and freight *thereon* as it should deem reasonable and proper, provided it should

¹ Vandall v. South San Francisco Dock Co., 40 Cal. 83.

not charge more than at the rate of eight cents a ton per mile for the transportation of property, nor more than ten cents a mile for the carriage of each passenger. It was held that the word "thereon," in the section fixing the rates of toll, meant the railroad proper and did not include the intervening waters which formed a part of the line of communication between the two cities.¹ The charter of the Chesapeake and Delaware Canal Company imposed a toll on commodities on board a vessel passing through the canal. No toll was given on the vessels themselves, except only when they had no commodities on board, or not sufficient to yield a toll of four dollars. Passengers were not mentioned, nor any toll given upon a vessel on account of such as it might have on board. It was held that the company could not refuse permission to a boat laden exclusively with passengers to navigate the canal upon payment of the toll imposed upon the vessel.²

Where a city or borough is made the terminus of a railroad, the whole territory within the municipal limits must be regarded as a single point, and the terminus may, therefore,

¹ Camden & Amboy R.R. Co. v. Briggs, 2 Zab. 623. OGDEN, MCCARTER, and PORTER, JJ., dissenting.

² Perrine v. Chesapeake & Del. Canal Co., 9 How. 172. TANEY, Ch. J., said: "The power claimed is the right to demand toll from every citizen who passes through the canal, and to fix the amount at the discretion of the corporation. In form, it is true, the demand is made on the owner of the vessel engaged in transporting passengers; but it is immaterial to the passenger whether he is charged with the toll in the increased price of his passage, or by a direct tax upon himself. In either case the result is the same, and the power exercised is the same. Such an unlimited power to levy contribution on the public, and one so inconsistent with the ordinary course of legislation upon the

subject, and we may add, so unjust and injurious to the public, ought not to be sustained in a court of justice unless it is conferred in plain and express words. It should not be inferred where the slightest doubt could arise, and the words are capable of any other construction; and still less can it be inferred in a charter like this, where the toll granted upon goods and property of every kind is so carefully specified and fixed in the law, and the charter altogether silent in relation to passengers." MCLEAN, J., dissented on the ground that the charter did not require the company to permit the transportation of passengers in boats paying toll as for empty boats, and the public could not exact from the company accommodation which the law did not impose upon it as a duty.

in the discretion of the company, be established at any spot within the limits thus prescribed. The act incorporating a railroad company authorized it to construct its road from the borough of Erie, the limits of which were afterward and before any work was done on the railroad, extended sixty rods further south. The company having commenced its road at the latter point, instead of at the original borough line, it was held not a compliance with the charter.¹ The act incorporating a railroad company gave the company power to construct a railroad commencing at or near the city of Schenectady, and running thence on the north side of the Mohawk River. It was held that the company was authorized to commence its railroad near the city on the north side of the river, or on the south side within the city; but that in case it did the latter, it was bound to extend the road across the river to the north side.²

In arriving at the meaning of a charter, contemporaneous

¹ *Com. v. Erie & Northeast R.R. Co.*, 27 Pa. St. 339. In this case, LEWIS, J., dissenting, said that "When a municipal corporation is made the terminus of a railroad, it is not like a tree, a rock, or any other object not liable to any material change, either under the laws of nature or the laws of man. It is more like a river, whose boundaries are changed by accretion and detrition. The rapid increase of population so frequently demands an extension of the boundaries of cities and towns that such alterations are deemed to lie in the contemplation of the legislature when making enactments, and of individuals when transacting business in relation to them. This is the rule in England, and it is one which applies with peculiar propriety to a new country like our own. When an act of Parliament, which was passed in 1840, prohibited the erection of any turnpike gate in the town of

Taunton, it was decided by the Queen's Bench that the word town referred to the boundaries existing at the time the gate was erected or continued, and not to the boundaries existing at the time the act was passed. It was declared that if a new gate was to be erected in 1870, the trustees were bound to consider whether the road was then within the limits of the town of Taunton, not whether it was so thirty years before. *Regina v. Cottle*, 16 Adol. & Ell. N. S. 412. An extension of the boundaries of the municipality is, therefore, nothing more than an enlargement of the discretionary powers of the railroad company." It will, however, be observed that, in the case referred to by Judge LEWIS, the construction was against the corporation and in favor of the public.

² *Mohawk Bridge Co. v. Utica & Schenectady R.R. Co.*, 6 Paige Ch. 554.

documents in causes relating to it, and parol testimony, may be resorted to in order to explain and give it a construction; but not to contradict it.¹ The governor's message and journals of the house are not, however, admissible for the former purpose;² nor what was said in debate on the passage of the charter.³ Where a bank charter was ambiguous, it was held that the contemporaneous construction put upon it by the stockholders, by the fiscal agents of the State, and by the legislature, commencing with its date, and continuing for a period of thirteen years thereafter, was such strong proof of the sense in which it was understood as to make the construction thus adopted authoritative.⁴

All such powers in addition to those expressly granted as are strictly incidental and necessary to carry out the object of the grant, are implied.⁵ Thus, the power to construct a railroad and establish transportation lines on it, necessarily includes the essential appendages required to complete and maintain such a work, and carry on such a business; as the power to erect and maintain depots, car houses, water tanks, shops for repairing engines, houses for switch and bridge tenders, coal or wood yards for fuel for the use of the locomotives, etc. So, within the same principle, a toll-house is a necessary appendage of a turnpike road.⁶ Courts will not look into the affairs of a corporation to determine the expediency of its action or motives when the action itself is lawful.⁷ The doctrine of the con-

¹ Lutton School v. Scarlett, 2 Younge & Jervis, 330.

² Bank of Pa. v. Com., 19 Pa. St. 144.

³ Binney's Case, 2 Bland Ch. 99.

⁴ Atty. Genl. v. Bank of Newbern, 1 Dev. & Batt. Eq. 216.

⁵ Sumner v. Marcy, 3 Woodb. & Minot, 105. See Hunter v. Marlboro, 2 Id. 168; Beatty v. Knowler, 4 Pet. 152; Starke v. High Arch Corp., 3 Taunt. 792.

⁶ State v. Mansfield, 3 Zab. 510; Wright v. Carter, 3 Dutcher N. J. 76;

State v. Newark, 1 Id. 315. It might be advantageous for a railroad company "to purchase land, and to erect houses in the right location and of the right kind for all of their constant employes, to establish factories for making their own rails, engines, and cars, even to purchase coal mines and supply themselves with fuel; but these are not among the necessary powers of such a company." Ibid.

⁷ Bailey v. Birkenhead, etc., R.R. Co.,

stitutional construction of political charters rests on a similar basis. "It is plain that corporations, in executing their express powers, are not confined to means of such indispensable necessity that without them there could be no execution at all. The contrary doctrine would lead at once to a very great absurdity ; for if there are several modes of accomplishing the end, neither one is indispensable, and each would exclude all the others. And thus, by inevitable logic, an express grant of power would be forever dormant because there are more modes than one of carrying it into execution. It is almost as difficult to say that the incidental power depends for its existence on the degree of necessity which connects it with the power in chief. Such a doctrine would impose upon courts a never-ending difficulty, for the inquiry would always be whether the chosen instrumentality is the very best that could be selected ; and if not the very best, however minute the difference may be, then the inevitable decision must follow that the choice was fatally bad, although strictly adapted to the end in view, and made in the utmost good faith. These demonstrations would seem to leave but one other conclusion, which is, that corporations, along with their specific powers, take all the reasonable means of execution, all that are convenient, and adapted to the end in view, although not the very best by many degrees of comparison. And this is a doctrine which must necessarily result in the liberty of choice amongst those means. The choice may be wise or unwise. If made in the exercise of an intelligent good faith, the wisdom of the selection may be called in question, but the power to make it cannot be."¹

But, as already stated, in order to derive power by implication, it must appear that the power thus to be implied is necessary to the enjoyment of some specifically granted

¹² Beav. 433 ; *Oglesby v. Attrill*, 105 U. S. 605.

¹ *Curtis v. Leavitt*, 15 N. Y. 9, per COMSTOCK, J.

right.¹ A road company was empowered by its charter to lay out, make, and keep in repair a road to the top of Mount Washington; granted the right to take tolls on passengers and carriages; authorized to take private land for its road; to build and own toll-houses, and to erect gates, and appoint toll-gatherers. An amendatory act provided that the company might erect and maintain, lease, and dispose of, any building or buildings which might be convenient for the accommodation of its business, and of the horses, carriages, and travelers passing over its road. It was held that power to establish stage and transportation lines to and from the mountain, and to purchase horses and carriages for that purpose, was not incidentally granted to the company by its charter.² The charter of a railroad company having provided that if the company did not locate its road so as to pass through certain places, it should forfeit one million of dollars to the State, which was assented to by the company, it was held a case not of contract, but of penalty, subject, as to its enforcement, to the will and pleasure of the legislature.³ A corporation will not be permitted to encroach, by implication, upon the rights of individuals who are in no respect parties to the compact between the legislature and such corporation.⁴ The grant of a right to build a dam across a stream does

¹ Chas. River Bridge v. Warren Bridge, 11 Pet. 420; Rice v. R.R. Co., 1 Black. 358; Jefferson Branch Bank v. Skelly, Ib. 436; Richmond, etc., R.R. Co. v. Louisa R.R. Co., 13 How. 71; Macon & Western R.R. v. Davis, 13 Ga. 68; Wood Hydraulic Hose Mining Co. v. King, 45 Ga. 34; Oswego Falls Bridge Co. v. Fish, 1 Barb. Ch. 547; Thorpe v. Rutland, etc., R.R. Co., 27 Vt. 140; State v. Chase, 5 Ohio St. 528; Collins v. Sherman, 31 Miss. 679; McIntyre v. Ingraham, 35 Id. 25; Gaines v. Coates, 51 Id. 335; Com. v. Central Passenger R.R., 52 Pa. St. 506;

Mathews v. Skinner, 62 Mo. 329. "An incidental power is one that is directly and mediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it." ELLSWORTH, J., in Hood v. N. Y. & New Haven R.R. Co., 22 Conn. 1.

² Downing v. Mt. Washington R. Co., 40 N. H. 230.

³ State v. Balt. & Ohio R.R. Co., 12 Gill & Johns. 399.

⁴ Auburn & Cato Plank R. Co. v. Douglass, 9 N. Y. (5 Seld.) 444.

not authorize the overflow of a mill on the stream above, which has been in existence a long time ; nor the grant of a right to maintain a stock-yard, authorize the company to conduct its business in such a way as to injure others.¹ The words in a charter, "it shall and may be lawful" for the corporation to do a thing, do not necessarily render it imperative, but leave the doing it optional with the corporation.² But words of permission to do an act which is clearly for the public benefit are obligatory. Therefore, where a charter provided that the mayor and jurat of an ancient town might maintain a court for the holding of pleas, which had long been disused, a mandamus was granted to compel the maintenance of such a court, at the instance of an inhabitant of the town.³ The specification of certain powers operates as a restraint to such objects only, and is an implied prohibition of the exercise of other and distinct powers.⁴ An act incorporating a railroad company gave the company power to acquire a strip of land not exceeding one hundred feet wide for a right of way, and to hold sufficient ground for the erection and maintenance of depots, landing-places or wharves, engine-houses, offices, machine-shops, and wood and water stations. S. entered into a written contract with the company, by which he agreed that, in consideration the company would locate a freight and passenger depot on the land of S., he would convey to the company, whenever called upon, four acres of land for that purpose, and that he would also lay off into town lots one hundred and sixty acres, in such manner as the engineer of the company might direct, and

¹ Lee v. Pembroke Iron Co., 57 Me. 481.

² Verplanck v. Mercantile Ins. Co., 1 Edw. Ch. 84.

³ Rex v. Mayor & Jurats of Hastings, 1 Dowl. & Ryl. 148.

⁴ People v. Utica Ins. Co., 15 Johns. 358. The general rule is, that a party,

acting under a power, must pursue the power strictly, and that where the mode or manner of executing the power is pointed out in the act or instrument creating the power, the mode must not be departed from in any essential respect. Goshorn v. Supervisors, 1 W. Va. 308 ; Pratt v. Short, 79 N. Y. 437.

deed an undivided fourth of it to such persons as the engineer of the company should designate. In a suit brought by the company for specific performance, it was held that, while the company was, in one sense, a private corporation, yet the public was deeply interested in it ; that its chartered privileges and emoluments were not granted solely and exclusively for private benefit and emolument, but to subserve a great public interest ; that the company had no power to acquire property for purposes of speculation ; and that therefore the contract could not be upheld or enforced.¹

Grants of franchises, and exemptions in charters, are construed strictly and most strongly in favor of the public and against the grant ; the object being to protect the public against improvident grants, and grants made by implication without clear intention. Ambiguity will vitiate a grant. It must, however, receive a reasonable construction.² The reason of the rule does not apply to a grant by which the State parts with no property, and creates no new privilege or franchise that can affect the public, but simply permits a new arrangement or contract as to privileges and franchises already granted.³ "The rules of construction which apply to general legislation in regard to those objects in which the public at large are interested, are essentially different from those which apply to private grants to individuals of powers or privileges designed to be exercised with special reference to their own advantage, although involving in their exercise incidental benefits to the community generally.⁴ The former are to be ex-

¹ Pacific R.R. Co. v. Seely, 45 Mo. 212.

² Black v. Del. & Raritan Canal Co., 22 N. J. Eq. (7 C. E. Green) 130; Richmond R.R. Co. v. Louisa R.R. Co., 13 How. 81; Perrine v. Chesapeake & Del. Canal Co., 9 Id. 172; Pennock v. Coe, 23 Id. 132; Rice v. R.R. Co., 1 Black. 380; Phila. & Erie R.R. Co. v.

Catawissa R.R. Co., 53 Pa. St. 20. See Sedgwick on Stats. 259, 327.

³ Black v. Del. & Raritan Canal Co., *supra*.

⁴ See Ohio Life Ins. & Trust Co. v. Debolt, 16 How. 416; Jefferson Branch Bank v. Skelly, 1 Black. 436; Balt. & Ohio R.R. Co. v. Supervisors, 3 W. Va. 319. "All rights which are as-

pounded liberally in favor of the public, and strictly against the grantees; the latter largely and beneficially for the purposes for which they were enacted. The power in the one case is original and inherent in the State or sovereign power, and is exercised solely for the general good of the community; in the other it is merely derivative, is special if not exclusive in its character, and is in derogation of the common right in the sense that it confers privileges to which the members of the community at large are not entitled."¹ To presume, therefore, that certain public rights have been surrendered to the corporation, an intention to surrender them must clearly appear in the charter. In *Providence Bank v. Billings*,² the charter, which was given by the legislature of Rhode Island, contained no stipulation on the part of the State that it would not impose a tax on the bank. Afterward a law was passed imposing a tax on all banks in the State; and the right to tax this bank was contested on the ground that if it were permitted the State might tax so heavily as to render the franchise of no value, and destroy the institution; that the charter was a contract, and that a power which may in effect destroy the charter is inconsistent with it, and is impliedly renounced in granting it. But it was held that the relinquishment by the government of the taxing power was never to be assumed. "As the whole community," said the court, "is

serted against the State must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State, and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to

the State. But if there is no ambiguity in the charter, and the powers conferred are plainly marked, and their limits can be readily ascertained, then it is the duty of the court to sustain and uphold it, and to carry out the true meaning and intention of the parties to it." DAVIS, J., in the *Binghamton Bridge*, 3 Wall. 51.

¹ STORRS, J., in *Bradley v. N. Y. & N. H. R.R. Co.*, 21 Conn. 294. And see 10 Fla. 145.

² 4 Pet. 514.

interested in retaining it undiminished, the community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear." A charter was granted to a turnpike company for twenty-five years, and at any time thereafter the State, upon paying its cost, was to own it. It was held that the corporation was entitled to control the road after the termination of the twenty-five years, until such time as the State purchased it, but not to exercise other rights not essential to the enjoyment of the road given to it by an amended charter, which was not expressly extended beyond the limit of the original charter.¹ Courts have construed the charter of a canal or railroad company, in relation to the right to take freight or toll, in favor of the public and against the company. Where power was given to a canal company to charge certain rates per ton for iron and other goods which should pass on any part of the canal through one or more locks, it was held that the company had no common law or other power to charge the rates on a portion of the canal where there were no locks.² A general right to lay out highways will not give the right to lay out a highway over navigable waters, or a grant to construct a turnpike or railroad authorize the grantees to obstruct an existing highway, unless such obstruction is necessary to give effect to the statute; and a grant of land covered by tide water does not affect the power and duty of the legislature to protect the public rights of navigation and fishing.³

¹ *St. Clair County Turnp. Co. v. The People*, 82 Ill. 174.

² *Stourbridge Canal Co. v. Wheeler*, 2 B. & Adol. 793. See *Barret v. Darlington & Stockton R.R. Co.*, 2 Man. & Gr. 134; *S. C. 7 Id.* 870; *Gildart v. Gladstone*, 11 East. 675; *Proprs. of Leeds & Liverpool Canal v. Hustler*,

1 Barn. & Cress. 424; *Camden & Amboy R.R. Co. v. Briggs*, 2 Zab. 623.

³ *Lees v. Canal Co.*, 11 East. 652; *Mills v. St. Clair County*, 8 How. 581; *Richmond R.R. Co. v. Louisa R.R. Co.*, 13 Id. 81; *Ohio Life & Trust Co. v. Debolt*, 16 Id. 435; *Holyoke Co. v. Lyman*, 15 Wall. 500; *Fertilizing Co. v.*

The grant by a State of the privilege to dig minerals upon the payment of a specified sum per ton does not give an exclusive right.¹ So the grant of a public road, bridge, or ferry confers a right to construct the improvement, and to receive certain rates of toll, but does not carry with it exclusive privileges where none such are expressly given.² Notwithstanding the legislature may have

Hyde Park, 97 U. S. 659; *Parker v. Gt. Western R.R. Co.*, 7 M. & Gr. 253; *Com. v. Erie & N. E. R.R. Co.*, 27 Pa. St. 339; *Miners' Bank v. U. S.*, 1 Greene, Iowa, 553; *Mohawk Bridge Co. v. Utica & Schenectady R.R. Co.*, 6 Paige Ch. 554; *Camden & Amboy R.R. Co. v. Briggs*, 2 Zab. 623; *Townsend v. Brown*, 4 Id. 80; *Bridge Co. v. Hoboken Land, etc., Co.*, 2 Beas. Ch. 81; *Strauss v. Eagle Co.*, 5 Ohio St. 39; *Collins v. Sherman*, 31 Miss. 679; *Auburn & Cato Plank R. Co. v. Douglass*, 9 N. Y. 444; *Commrs. on Inland Fisheries v. Holyoke Water Power Co.*, 104 Mass. 446; *Sedgwick on Sts. & Const. Law*, 339. It does not make a private corporation public that the State or the United States own a portion of its stock. *Bardstown, etc., R.R. Co. v. Metcalf*, 4 Metc. Ky. 199.

¹ *Bradley v. South Car. Phosphate Co.*, 1 Hugh. 72.

² *Parrot v. City of Lawrence*, 2 Dillon, 332; *State v. Noyes*, 47 Me. 189. Mr. Kent, in an early edition of his Commentaries remarked that "if the creation of the franchise be not declared to be exclusive, yet it is necessarily implied in the grant, as in the case of the grant of a ferry or bridge, turnpike, or railroad, that the government will not, either directly or indirectly, interfere with it so as to destroy or materially impair its value. Every such interference, whether it be by the creation of a rival franchise or otherwise, would be in violation or in fraud of the grant. All grants of franchises ought to be so

construed as to give them due effect by excluding all contiguous competition which would be injurious and operate fraudulently upon the grant." But, in a subsequent edition, he admits that this doctrine of the extension of a franchise by implication, has been overthrown by the decisions. In *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, the legislature of Massachusetts had, in 1785, incorporated a company to build a bridge over the Charles River, granting them power to receive toll. The bridge was built, and the company enjoyed the tolls until 1828, when the legislature incorporated another company with power to build another bridge across the same river near the former bridge, and also to take toll. The charter to the first company did not give them in express terms any exclusive right. They filed a bill to prevent the erection of the second bridge. The Supreme Court of Massachusetts dismissed the bill, and, on appeal to the Supreme Court of the United States, the decision was affirmed. Chief Justice TANEY, in delivering the opinion of the latter court, remarked that "it would present a singular spectacle if, while the courts in England are restraining within the strictest limits the spirit of monopoly and exclusive privileges in the nature of monopolies, and confining corporations to the privileges plainly given to them in their charters, the courts in this country should be found enlarging these privileges by implication." See

granted to a corporation the exclusive right to erect a toll bridge across a river, the subsequent grant to a railroad company of a right to cross the river with its railroad, and to transport passengers thereon, in the ordinary course of conveying travelers from one place to another, is not an infringement of the privileges conferred by such prior grant; a railroad bridge not being a toll bridge within the intent and meaning of the grant to the first company.¹ If the grantee wishes to secure himself from competition, he must obtain a provision to that effect in his grant; and if no such provision is inserted in it, it will be inferred that he took the grant relying on the wisdom and discretion of the legislature to protect him from injurious competition by refusing to authorize any other enterprise of a similar character in the immediate vicinity unless demanded by the exigencies of trade and travel.² The first section of an act granting a ferry right provided that Timothy Fanning, his heirs and assigns, were authorized to establish and maintain a ferry across the Mississippi River at Dubuque. The second section declared that no court or board of county commissioners should authorize any other person to keep a ferry within the limits of the town of Dubuque. A subsequent act incorporating the city of Dubuque gave to the city council power to license and establish ferries across the Mississippi River from the city of Dubuque to the opposite shore. It was held that the grant to Fanning was not intended to be exclusive; and that as the legislature had

Tuckahoe Canal Co. v. Tuckahoe R.R. Co., 11 Leigh, 42; Enfield Toll Bridge Co. v. Hartford & New Haven R.R. Co., 17 Conn. 454; Oswego Falls Bridge Co. v. Fish, 1 Barb. Ch. 547; Thompson v. N. Y. & Harlem R.R. Co., 3 Sandf. Ch. 625.

¹ Mohawk Bridge Co. v. Utica & Schenectady R.R. Co., 6 Paige Ch. 554; Thompson v. N. Y. & Harlem R.R. Co., 3 Sandf. 625; McRee v.

Wilmington & Raleigh R.R. Co., 2 Jones N. C. 186; Bridge Co. v. Hoboken Land, etc., Co., 2 Beas. Ch. 81, aff'd 1 Wall. 116.

² Shorter v. Smith, 9 Ga. 517, per LUMPKIN, J. See Ogden v. Gibbons, 4 Johns. Ch. 150; Newburg Turnpike Co. v. Miller, 5 Id. 101; Livingston v. Van Ingen, 9 Johns. 507; Stark v. McGowen, 1 Nott & McCord, 387.

power to authorize another ferry, the general authority to the council to license and establish ferries, enabled the corporation, in the exercise of its discretion, to grant a license, as the legislature might have done.¹ When the rights and privileges vested in a corporation by its charter are to be determined by reference to the charter of another and distinct corporation, some provisions of which are of doubtful import, the construction should be against the corporation.² But although the provisions of a charter are not, strictly speaking, harmonious, yet if by a reasonable construction they can be made consistent, all of them must stand.³

When a corporation is authorized by law to sell or convey its charter or franchise, and thus vest it in others, the transaction in legal effect is a surrender or abandonment of the old charter by the incorporators, and a grant of a similar charter to the transferees or purchasers.⁴ A charter which is to continue "until the first day of January," is exclusive in its meaning, and the charter expires on the thirty-first of December.⁵

§ 139. Inviolability of charter.—Charters, and amendments

¹ *Fanning v. Gregoire*, 16 How. 524.

² *Bowling Green, etc., R.R. Co. v. Warren County Ct.*, 10 Bush. Ky. 711. When there is a clear repugnance between two laws, and the provisions of both cannot be carried into effect, the latter law must prevail. *Dingman v. The People*, 51 Ill. 277.

³ *State v. Stoll*, 17 Wall. 425.

⁴ *State v. Sherman*, 22 Ohio, 411. When a charter operates as a new creation, the new corporation is not subject to the liabilities of the old one. *President, etc., of Fort Gibson v. Moore*, 13 Sm. & Marsh, 157. Persons who purchase the property and franchises of a corporation are not thereby invested with the rights and privileges of the corporation, until they are themselves incorporated. *Chaffe v. Luderling*, 27 La. An. 607. The right to

build and run a railroad, and take tolls or fares, is a franchise of the prerogative character, which no person can legally exercise without a special grant of the legislature. *State v. Boston, Concord & Montreal R.R. Co.*, 25 Vt. 433; *Stewart's Appeal*, 55 Pa. St. 413. Although a bank should, by a transfer of all of its property, render itself powerless to discharge the ordinary purposes of its institution, it would still remain an existing corporation. *State v. Bank of Md.*, 6 Gill & Johns. 205. Where a trustee is a corporation, no modification of its franchises, or change in its name, while its identity continues, can affect its right to hold property devised to it. *Girard v. Philadelphia*, 7 Wall. 1.

⁵ *People v. Walker*, 17 N. Y. 502.

thereto, granted by the legislature, accepted by the stockholders; and by virtue and on the faith of which their means are invested in the enterprise, constitute a contract between the sovereign power and the individual stockholders, which is protected by the inhibition in sec. 10, art. 1, U. S. Constitution, that no State shall pass any law impairing the obligation of contracts; a grant of franchises, not being distinguishable in point of principle, from a grant of any other property.¹ It follows, that every valuable privilege given by the charter, and which conduced to an acceptance of it, and an organization under it, is a contract which cannot be changed by the legislature, when the power to do so is not reserved by the charter.² The rule is, that "if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of legislation, or decision of its courts, altering the construction of the law."³ In the year 1769, the king

¹ *Fletcher v. Peck*, 6 Cranch, 88; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Wilmington R.R. Co. v. Reid*, 13 Wall. 264; *Delaware R.R. Tax*, 18 Id. 225; *Sinking Fund Cases*, 99 U. S. 700; *Louisville v. University of Louisville*, 15 B. Mon. 642; *Gregory v. Shelby College*, 2 Metc. Ky. 598; *Hamilton v. Keith*, 5 Bush. Ky. 458. As a private corporation is a contract between the government and the corporators, the legislature cannot repeal, impair, or alter the rights and privileges conferred by the charter against the consent and without the default of the corporation judicially ascertained and declared in a proceeding instituted directly for that purpose at the instance of the government; and no advantage can be taken of any nonuser or misuser on the part of a corporation by a defendant in a

collateral action. *Young v. Harrison*, 6 Ga. 130.

² *Piqua Bank v. Knoop*, 16 How. 369; *Mowrey v. Indianapolis, etc., R.R. Co.*, 4 Biss. 78; *Sala v. New Orleans*, 2 Woods, 188; *Harrington v. Tennessee*, 95 U. S. 679; *Berthin v. Crescent City Slaughter House Co.*, 28 La. An. 210; *St. Louis v. Manf., etc., Bank*, 49 Mo. 574; *Black v. Del. & Raritan Canal Co.*, 24 N. J. Eq. 455; *Green v. Biddle*, 8 Wheat. 84.

³ *Ohio Life & Trust Co. v. Debolt*, 16 Ohio, 432. In *State v. Southern Pacific R.R. Co.*, 24 Texas, 80, ROBERTS, J., who delivered the opinion of the court, in a note at the end of the case, expressed disapproval of the doctrine, which he admitted had been settled by the highest authority, and generally acquiesced in, that a charter of a corporation is a contract within the

of Great Britain granted a charter to Dartmouth College, which vested in twelve trustees the power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study, and of filling va-

meaning of the constitution. He said: "A grant of a franchise is like a grant of land. It may be construed into a contract, but it is the work of construction. It is not treated as a contract, and was never, as it is believed, spoken of in that connection by those who taught or administered the laws up to the time of the adoption of the constitution, nor indeed up to the time of the leading cases of *Fletcher v. Peck*, and *Dartmouth College v. Woodward*. This construction met with dissent when first adopted. Its application to new cases, as they have arisen, has met with increasing disagreement and dissent. If carried to its legitimate conclusion to the full extent, the State government may, by improvident legislation, be deprived of many of its important powers ceded by contract to the numerous corporations that are filling the country, without the capacity to reclaim them except by a revolution." In *Bank of Toledo v. The City of Toledo*, 1 Ohio St. 622, where a question arose as to the constitutionality of a statute providing for a tax upon banks, and bank and other stock, BARTLEY, Ch. J., in the course of an elaborate opinion, said: "It is apparent, from a thorough examination of the subject, that the distinction between public and private corporations, as ordinarily recognized in the books, is a mere arbitrary distinction, without foundation in the nature, objects, incidents, or property of this class of institutions. And in truth, there exists no sound and well-founded reason for treating the charters of those corporations usually called private corpora-

tions, as contracts, while the charters of those known as public corporations, are not so considered, or for denominating the former as mere private institutions, and the latter as public institutions; and the paramount considerations of the public interests or general welfare, would certainly require that the former should be subject to regulation by the law-making power as well as the latter. . . . An ordinary act of incorporation contains nothing more than the usual stipulations and provisions to be found in laws generally. Persons asking for the passage of a law incorporating a company, do not in fact think of such a thing as a negotiation for entering into a contract with the State.* And the members of the legislature, in the enactment of such laws, never imagine that they are negotiating and settling the terms and conditions of a contract on behalf of the State; and much less that they are by contract surrendering or parting with a portion of the legislative power of regulation and repeal. In every point of view, therefore, the idea that the charter of a corporation is a contract whereby this legislative power of regulation and repeal is bargained away or disposed of by contract, is a legal fiction in opposition to the truth of the fact, and the obvious intention of the persons interested. Courts should not thus treat those high trusts of civil authority, and by legal intendments, and mere technical reasoning, take away from the State any portion of that power over its own internal police and government, which may be highly important to its well-being and prosperity."

cancies in their own body. The legislature of New Hampshire passed an act to amend the charter, by which the number of trustees was increased to twenty-one, the appointment of the additional members being given to the executive of the State; and a board of twenty-five overseers created, with power to inspect and control the more important acts of the trustees. The board was to be completed by the governor and council of New Hampshire, who were to fill all vacancies; and the president of the senate, the speaker of the house of representatives of New Hampshire, and the governor and lieutenant-governor of Vermont for the time being, were to be members *ex officio*. It was held that the act, in thus attempting to abridge the powers of the corporation, and to require them to be exercised in a different mode, impaired the obligation of a contract, and was therefore unconstitutional and void.¹ Where a company was incorporated to build and maintain a bridge, without limit as to duration, and the charter provided that it should not be lawful for any person or persons to erect a bridge within two miles, it was held to mean that the legislature would not make it lawful by licensing any person or persons to do it, and to constitute a contract which was inviolable.² By the original charter of a bridge, no power was reserved by the legislature to repeal, alter, or modify it, nor to impose additional burdens upon the corporation after it had complied with the terms prescribed by the grant until it should be reimbursed its expenses incurred in the erection of the bridge, with twelve per cent. interest thereon from the tolls, which were to be subject to such order and regulations as the legislature might think proper to make. The charter required the company to remove obstructions in the river, to pay the proprietors of an ancient ferry for the loss of their franchise, and to con-

¹ Dartmouth College v. Woodward,
supra.

² The Binghamton Bridge, 3 Wall.
51.

struct and maintain a draw in the bridge, thirty-two feet wide, for the free passage of vessels. The bridge having been carried away by the ice, the legislature released the company from certain previous obligations in relation to the construction of abutments and piers, and enacted that no other bridge should be erected within a distance of six miles, provided that none of the rights, privileges, and immunities of persons using and navigating the river should thereby be impaired. The company having rebuilt and maintained the bridge until 1845, the legislature enacted that the company should construct a draw, fifty feet wide, for the free transit of all registered and licensed vessels, said draw to be made under the direction of commissioners; that the collection of all tolls should be suspended until this was done; and that if a vessel should be kept back in consequence of the inadequacy of the draw, the owner might recover from the company damages therefor. On a writ of *quo warranto*, alleging that the company had forfeited its charter by disregarding the requirement in relation to the making and maintaining a draw fifty feet in width, it was held that the proceeding could not be sustained, the charter not reserving to the legislature power, without the assent of the company and without providing for compensation, to compel the construction of a draw of enlarged capacity in the place of the original one.¹ The

¹ *Washington Bridge Co. v. The State*, 18 Conn. 53. In charters granting special public privileges, no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey. In *Charles River Bridge v. The Warren Bridge*, 17 Peters, 420, the legislature of Massachusetts granted a charter to a company to build a bridge over the Charles River, with the right to take toll for forty years. The bridge

having been built and opened for travelers, six years afterward the charter was extended to seventy years from the opening of the bridge, and, at the expiration of that time, it was to belong to the State. The grant contained no exclusive privilege over the waters of the river above or below the bridge, and it was held that the State could constitutionally, by a subsequent act of incorporation, confer on another company the right to construct a rival bridge.

manufacture of gas and its distribution for public and private use, by means of pipes laid under legislative authority in the streets and ways of a city, is not an ordinary business in which every one may engage, but is a franchise belonging to the government, to be granted for the accomplishment of public objects, and is a contract protected by the Constitution of the United States against State legislation to impair it.¹ It is in general competent for the legislature to alter the charter of a municipal corporation; there being a distinction in this respect between private and public corporations.² The State may, however, make a contract with a public corporation which it cannot subsequently impair or resume. A grant may be made to a public corporation for purposes of private advantage; and although the public may also derive a common benefit from it, yet the corporation stands on the same footing, as respects such grant, as would any body of persons upon whom like privileges are conferred. "So far as a municipal corporation is endowed by law with the power of contracting, and as such is made capable of acquiring, holding, and disposing of property, and subject to the liabilities incident to the exer-

¹ *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650. See *New Orleans v. Clark*, 95 U. S. 644; *State v. Cincinnati Gas Co.*, 18 Ohio St. 262; *Boston v. Richardson*, 13 Allen, 146; *Crescent City Gas Light Co. v. New Orleans Gas Light Co.*, 27 La. Ann. 138; *Com. v. Pottsville Water Co.*, 94 Pa. St. 516.

² *Marietta v. Fearing*, 4 Ohio, 427; *Tinsman v. Belvidere R.R. Co.*, 2 Dutcher, 148. In Illinois an incorporated township for common school purposes, being a *quasi* corporation, the legislature may from time to time direct in what manner the school funds shall be loaned, upon what security, at what rate of interest, in what currency they shall be received, and by whom

they shall be applied. "In respect to such *quasi* corporations as exist only for public purposes, the legislature has an unquestionable right to change, modify, enlarge, restrain, or destroy, and may exercise a superintending control over all their money and other property; securing, however, as a matter of good faith, the effects of the corporation for the use of those for whom it was donated or purchased." *Bush v. Shipman*, 4 Scam. 186. Where an act incorporating a town gives to the authorities of the town certain powers, it does not deprive the courts of jurisdiction, unless the powers vested in the corporation are declared by the act to be exclusive. *Baldwin v. Green*, 10 Mo. 410.

cise of such power and capacity, thus being invested with legal rights as to property and contracts, and made subject to legal liabilities in respect thereto, to be enforced by suit in the ordinary judicial forums, upon the same principles and by the same means as in the case of a private corporation, such municipal corporation must stand on the same ground of exemption from legislative control and interference as a private corporation. As to third persons who seek to enforce pecuniary liabilities against towns arising upon contract, such towns are merely private corporations or individuals, and, in this respect, they are not affected by the purely municipal, public, and political features that appertain to their corporate existence, in virtue and in reference to which alone they are subject to the absolute control of legislation.”¹

¹ *Atkins v. Randolph*, 31 Vt. 226, per BRONSON, J. See *Montpelier v. East Montpelier*, 29 Vt. 12. Where a city enters into a contract to supply its inhabitants with gaslight, it acts as a private corporation, and cannot impair the obligation of a contract, although it may consider it will thereby benefit its citizens. *Western Saving Fund Soc. v. Phila.*, 31 Pa. St. 175. LEWIS, C. J.: “The contracts which a municipal corporation may make for the purpose of supplying the inhabitants with gaslight in their streets and houses, relate to the things of commerce, as distinguished in the civil law from the things public, which are regulated by the sovereign. Such contracts are not made by the municipal corporation by virtue of its powers of local sovereignty, but in its capacity of a private corporation. The supply of gaslight is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough

or city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city, as much so as the lands and houses belonging to it. Blending the two powers in one grant does not destroy the clear and well-settled distinction, and the process of separation is not rendered impossible by the confusion. In separating them, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred.” See *Bailey v. New York*, 3 Hill, 538, where the acts of the city were in relation to the construction of water-works.

“There are unquestionably cases in which the State may grant privileges to specified individuals without violating any constitutional provision, because in the nature of the case it is impossible that they should be possessed and enjoyed by all; and if it is important that they should exist, the proper State authority must be left to select the grantee. But in all such cases the person, whether natural or artificial, to whom the privilege is granted, is bound upon accepting it to render to the public that service the performance of which was the inducement to the grant; and it is because of such obligation to render service to the public that the legislature has the power to make the grant. Permission to keep a tavern or a ferry, to erect a toll-bridge over a stream where it is crossed by a public highway, to build a dam across a navigable stream, and the like, are special privileges, and being matters in which the public have an interest, may be granted by the legislature to individuals or corporations; but the grantee, upon accepting the grant, at once becomes bound to render that service to secure which the grant was made; and such obligation on the part of the grantee is just as necessary to the validity of a legislative grant of an exclusive privilege as a consideration, either good or valuable, is to the validity of an ordinary contract. Whenever, by accepting such privilege, the grantee becomes bound by an express or implied undertaking to render service to the public, such undertaking will uphold the grant, no matter how inadequate it may be; for the legislature being vested with power to make grants of that character when the public convenience demands it, the legislative judgment is conclusive, both as to the necessity for making the grant and the amount of service to be rendered in consideration therefor, and the courts have no power to interfere, however inadequate the consideration or unreasonable the grant appears to be. But when they can see that the grantee of an exclusive privilege has come under no obligation what-

ever to serve the public in any matter in any way connected with the enjoyment of the grant, it is their duty to pronounce the grant void as contravening the provision of the bill of rights which prohibits the granting of exclusive privileges, except in consideration of public services."¹

A supplement to a charter of incorporation which merely confers upon it a new right or enlarges an old one, without imposing any new or additional burden upon it, is a mere license or promise by the State, and may be revoked at pleasure.² The constitutional prohibition upon State laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public in the same sense and to the same extent as are all contracts and all property, whether owned by natural persons or corporations.³

The alteration of the charter by the legislature may impair the obligation of the contract, not between the government and the corporators, but between the corporators

¹ COFER, J., in *Gordon, etc., v. Winchester Building, etc., Assoc.*, 12 Bush. Ky. 110. See *Railroad Co. v. Philadelphia*, 101 U. S. 528; *Railroad Co. v. Commrs.*, 103 Id. 1; *Morgan v. Louisiana*, 93 Id. 217. "A compact lies at the foundation of all national life. Contracts mark the progress of communities in civilization and prosperity. They guard, as far as possible, against the fluctuations of human affairs. They seek to give stability to the present and certainty to the future. They gauge the confidence of man in the truthfulness and integrity of his fellow-man. They are springs of business, trade, and commerce. Without them society

could not go on. Spotless faith in their fulfilment honors alike communities and individuals. Where this is wanting in the body politic, the process of descent has begun and a lower plane will speedily be reached." SWAYNE, J., in *Farrington v. Tennessee*, 95 U. S. 679.

² *Philadelphia & Co.'s Appeal*, 102 Pa. St. 123; *Johnson v. Crow*, 87 Id. 184; *Christ Church v. Phila.*, 24 How. 300; *Salt Co. v. East Saginaw*, 13 Wall. 373. See *Hewitt v. N. Y. & Oswego, etc., R.R. Co.*, 12 Blatchf. 452; *St. Louis Iron Mt., etc., R.R. Co. v. Loftin*, 30 Ark. 693.

³ *New Orleans Gas Co. v. Louisiana Light Co.*, *supra*.

themselves, who, having joined the association for a particular purpose, it is proposed to abandon it, and substitute another and different purpose. No radical change or alteration can be made or allowed in the charter of a corporation by which new and additional objects are to be accomplished, or responsibilities incurred, so as to bind the individuals composing the company, without their assent; substantive alterations not being regarded as parcel of a private charter, without the previous concurrence of the corporators manifested in some way recognized by law.¹

The legislature cannot compel the corporation to embark in a new enterprise, but only grant it the power, and then it will be for the corporation to accept it or not as it pleases. The right to bind the corporators will depend upon the question whether the change is of such a character that it may be deemed so far in furtherance of the original undertaking and incidental to it, as to be fairly within the power of the corporation to bind its individual members by its as-

¹ "In determining the question as to how far the original purposes of a corporation may be departed from, after subscriptions have been made to its stock, without violating the rights of the stockholders individually, we must first consider with what intention, and in view of what advantages, the law must presume such subscriptions were made. The conclusive presumption is, that it was with a view to the profits to be derived from the stocks thus subscribed as an investment, and not in reference to any incidental advantages which may accrue to the stockholders by reason of the construction of the improvement in consequence of any anticipated enhancement of any other property which the stockholder may own, or otherwise. . . . There must be a palpable abuse of power by the majority or governing majority, to the prejudice of the minority or dissenting portion, before the courts would be authorized

to declare its exercise illegal. If the act is performed in good faith, and with the real intent to promote the best interests of the concern, even though it might turn out disastrously, the act would be none the less legal. . . . It is true that the original purpose or object of the corporation may not be entirely changed or abandoned, and a new one undertaken; such as a railroad abandoned for a canal, or line of steamboats, or possibly, one railroad route abandoned, and another in an opposite direction, and which could have no affinity to or connection with the first, adopted. But we know of no instance where the mere limitation or enlargement of the original plan or purpose has been held not to be within the implied powers of the majority or controlling authority." CATON, C. J., in *Sprague v. Illinois River R.R. Co.*, 19 Ill. 174.

sent, or is such a departure from the original purpose that no member can be presumed to have assented to it.¹ A corporation authorized "to establish an institution for the instruction of youth," cannot receive and pay out money for the support of missionaries, such acts being foreign to the purposes of its creation;² or the control of an institution be arbitrarily changed from one religious sect to another; or the funds of the donors be diverted to any new use inconsistent with the intent and purpose of the charter; or subscribers to the stock whose subscriptions are conditional, be compelled to waive any of the conditions of their contract;³ notwithstanding a majority can control or manage the business against the will and interest of the minority, so long as it is within the scope of the charter.⁴

¹ *Clearwater v. Meredith*, 1 Wall. 39; *Lauman v. Lebanon Valley R.R. Co.*, 30 Pa. St. 46; *Middlesex Turnpike Co. v. Locke*, 8 Mass. 268; *Hartford & New Haven R.R. Co. v. Crosswell*, 5 Hill, 381; *Kanosha R.R. Co. v. Marsh*, 17 Wis. 13; *Schenectady, etc., Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Buffalo & N. Y. R.R. Co. v. Dudley*, 14 Id. 336; *Durfee v. Old Colony, etc., R.R. Co.*, 5 Allen, 230; *New Orleans R.R. Co. v. Harris*, 27 Miss. 517, 536; *Zabriskie v. Hackensack, etc., R.R. Co.*, 18 N. J. Eq. 178; *Black v. Delaware, etc., Canal Co.*, 24 Id. 467.

² *Trustees v. Peaslee*, 15 N. H. 317.

³ *State v. Adams*, 44 Mo. 570; *R.R. Co. v. Veazie*, 39 Me. 58; *Sage v. Dillard*, 15 B. Mon. 357. A majority of a religious society are not entitled to control in church matters in violation of the laws of the organization or denomination to which it belongs. "People join such associations for the sake of their benefits, and from faith that they will be conducted according to known principles, and not by mere whims or majorities. It is, therefore, of no sort of importance what may be

the majority in such matters, it cannot weigh a feather against well-known law in affecting the rights of the minority. Before civil authority the question is, not what party has the majority, but which is right according to the law by which the body has hitherto consented to be governed." *Sutter v. Trustees, etc.*, 42 Pa. St. 503, per LOWRIE, C. J. But the temporal concerns of the society are governed by the rule of the majority. *Miller v. English*, 1 Zab. 317. A religious society being in debt to an amount nearly equal to the value of its property, which was exposed to attachment, with no other means of payment, it was held that it might, by a vote of the majority, sell its property for the payment of its indebtedness, and remove to an adjoining town, against the objection and protest of a member of the society who had contributed toward the erection of the church edifice. *Eggleston v. Doolittle*, 32 Conn. 396.

⁴ "The dissentient stockholder may object that his co-corporators have no power to make a new contract for him, and thereby constitute him a member

But becoming incorporated for an object named, without any specified time for the continuance of the business, is not a contract to continue it indefinitely, and a majority of the corporators may abandon the enterprise and sell the property.¹ It does not, however, follow that, by the same authority, the works may be leased to be carried on by others, the corporation continuing to exist, the right to elect directors, by whom the business is to be managed, being a contract which neither the State nor a majority can interfere with.² Where a company was incorporated for the

of a new and different corporation. He may object that even the legislature cannot authorize this, for by so doing, it would authorize the destruction of one private contract, and the compulsory creation of another in its stead, and would take away the remedy by due course of law which the dissenting stockholder is entitled to, because of the departure of the association from its agreed purposes; and would, besides this, change the essential nature of contracts, which even legislative power cannot do, and much less legislative authority." *LOWRIE, C. J.*, in *Lauman v. Lebanon Valley R.R. Co.*, 30 Pa. St. 46. "The proposition now considered, is whether, after the shareholders have entered into a contract among themselves under legislative sanction, and expended their money in the execution of the plan mutually agreed upon, the scheme can be radically changed by the majority by virtue of legislative enactment, and a dissentient stockholder compelled to engage in a new and totally different undertaking, without impairing the obligation of his contract with his associates and with the State. That this cannot be done, is as well supported by every consideration of justice and right, as it is firmly imbedded in judicial decision." *VAN SYCKEL, J.*, in *Black v. Del. &*

Raritan Canal Co., 24 N. J. Eq. (9 C. E. Green) 455.

¹ *Treadwell v. Salisbury Manf. Co.*, 7 Gray, 393; *Pratt v. Jewett*, 9 Id. 34; *Com. v. Fitchburg R.R. Co.*, 12 Id. 180; *Wilson v. Cent. Bridge Co.*, 9 R. I. 590; *Merchants', etc., Line v. Wagener*, 71 Ala. 581. In Georgia, by the code, a corporation may voluntarily surrender its charter and franchises, but if incorporated by the legislature the surrender must be accepted by the legislature. *Mechanics' Bank v. Heard*, 37 Ga. 401. The dissolution of a corporation, sale of its property, and division of its assets, may be enjoined when the society constitutes a charity. *Mayer v. Soc. for the Visitation of the Sick*, 2 Brewster, Pa. 385. A corporation has no right to transfer all of its property, and take in payment stock in a corporation carrying on business in another State. *Taylor v. Earle*, 15 N. Y. Supm. Ct. 1.

² *Black v. Del. & Raritan Canal Co.*, *supra*. An act authorizing certain railroad and canal companies, with the consent of two-thirds of the stockholders of each, to consolidate with any other railroad or canal company in the State, or otherwise, with which they were identified in interest, or whose works formed with theirs continuous or connected lines, and to make such

purpose of transporting passengers and merchandise, in steamboats, vessels, and stages, between A. and B., it was held that a contract entered into by the company to break the ice, and tow vessels through the channel thus made, such vessels being bound to C., was void.¹ So, a company having been incorporated "for the purpose of establishing and conducting a line of steamboats and stages or carriages, between Baltimore, Fredericksburg, and the several ports and places on the Rappahannock, and on the rivers and waters of Chesapeake Bay, for the conveyance of passengers and transportation of merchandise and other articles," it was held that a contract entered into by the company to assist in opening and rendering navigable the Rappahannock River could not be upheld.² In *Coleman v. Eastern Counties R.R. Co.*,³ the company was restrained, at the suit of a shareholder, from employing its funds in establishing steam communication between Harwich, the terminus of the road, and northern ports of Europe. Lord LANGDALE said: "Ample powers are given for the purpose of constructing and maintaining the railway, and for doing all those things required for its proper use when made. But I apprehend that it has nowhere been stated that a railway company, as such, has power to enter into all sorts of other transactions. Indeed it has been very properly admitted that railway companies have

an arrangement for consolidation by agreement, contract, lease, or otherwise, as to the directors might seem expedient, provided stockholders dissatisfied with the same should be paid the full value of their stock previous to such consolidation, is constitutional, and confers upon the companies power to lease to a corporation of another State. *Ib.* It was held in Pennsylvania, that a company created by consolidating two corporations of New York, with one of Ohio, and one of

Pennsylvania, into a new corporation, with the consent of two-thirds of the stockholders of each, according to the provisions of a statute of Pennsylvania, constituted a lawful corporation. *Com. v. Atlantic & Gt. Western R.R. Co.*, 53 Pa. St. 9.

¹ Pa., Del. & Md. Steam Nav. Co. v. Dandridge, 8 Gill & Johns. 248.

² *Abbott v. Baltimore, etc., Co.*, 1 Md. Ch. 542.

³ 10 Beav. 1; s. c. L. J. N. S. Ch. 73.

no right to enter into new trades or business not pointed out by the acts. But it has been contended that they have a right to pledge without limit the funds of the company for the encouragement of other transactions, however various and extensive, provided the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the shareholders. There is, however, no authority for anything of that kind. It has been stated that these things to a small extent have been frequently done since the establishment of railways; but unless the acts so done can be proved to be in conformity with the powers given by special acts of Parliament under which those acts are done, they furnish no authority whatever." A joint stock corporation created for the transaction of "a general insurance agency, commission, and brokerage business, and such other things as are incidental to and necessary in the management of that business," is not clothed with power to subscribe to the stock of a savings bank and building association;¹ or an insurance company to advance its money or obligations to sustain another corporation in a similar or dissimilar business.² A company incorporated to "saw and vend wood, lumber, and manufactures from it," with a capital of \$150,000, one-half personal, and the other half real estate, cannot lawfully embark in the business of banking, nor purchase stock in a bank, thereby greatly increasing its authorized capital, so as to render the company or its members liable on promissory notes therefor.³ A railroad company could not engage in banking business in order to raise a fund with which to construct or operate its road;⁴ nor a company chartered for the purpose of constructing, maintaining, and operating a railroad, embark in the business of running a line of steamboats in connection

¹ *Mechanics', etc., Savings Bank v. Meriden Agency Co.*, 24 Conn. 159.

² *Berry v. Yates*, 24 Barb. 199.

³ *Sumner v. Marcy*, 3 Woodb. & Minot, 105.

⁴ *Waldo v. Chicago R.R. Co.*, 14 Wis. 580.

with the railroad, however much such an enterprise might increase the traffic of the road and add to its profits;¹ nor a corporation formed for the purpose of constructing a certain improvement be converted into a company to construct an improvement of a different character, without absolving those who did not choose to be bound. A railroad intended to secure the advantages of a particular line of travel and transportation, cannot be so changed as to defeat that general object.² An amendatory act effected

¹ *McCarty v. Roots*, 21 How. 432.

² A railroad company is bound to apply all of its funds for the purposes provided and directed by the act of incorporation, and for no other purpose. *East Anglian R.R. Co. v. Eastern Counties R.R. Co.*, 21 L. J. N. S. C. P. 23; 7 Eng. L. & Eq. 505. JERVIS, C. J.: "Every proprietor, when he takes shares, has a right to expect that the conditions upon which the act was obtained will be performed; and it is no sufficient answer to a shareholder expecting his dividend, that the money has been expended upon an undertaking which at some remote period may be highly beneficial to the line. The public also has an interest in the proper administration of the powers conferred by the act. The comfort and safety of the line may be seriously impaired if the money supposed to be necessary and destined by Parliament for the maintenance of the railway be expended in other undertakings not expressly sanctioned by the legislature." And see *Salomons v. Laing*, 12 Beav. 352; *Bagshaw v. Eastern Union R.R. Co.*, 2 Mac. & G. 389; s. c. 18 L. J. N. S. Ch. 193; *Beman v. Rufford*, 20 L. J. N. S. Ch. 357. The holding of a "world's peace jubilee and international musical festival" is an enterprise wholly outside the objects for which a railroad corporation is established; and a contract to pay, or guarantee the pay-

ment of the expenses of such an enterprise, cannot be held binding on the corporation by reason of the supposed benefit it may derive from an increase of passengers over its road, upon any grounds that would not hold it equally bound by a contract to partake in, or to guarantee the success of any enterprise that might attract population or travel to any city or town upon or near its line. *Davis v. Old Colony R.R. Co.*, 131 Mass. 258. So, the power to manufacture and sell goods of a particular description does not include the power to partake in or guarantee the profits of an enterprise which may be expected to increase the use of or demand for such goods. *Ib.*; *Riche v. Ashbury R.R. Carriage & Iron Co.*, L. R. 9, Ex. 264. It was said by the court in an early case in Kentucky, and reiterated by the same court recently, that "the unrestricted power to buy and sell real property being inconsistent with the nature and purposes of banking institutions, the legislature has not in any instance conferred upon such corporations, nor has this court ever held that the implied power to do so exists to the extent and for the purpose of obtaining buildings in which to transact their business, and of securing or collecting debts due them in their prescribed sphere of business." *Lathrop v. Commercial Bank of Scioto*, 8 Dana, 119; *Thweatt v. Bank of Hop-*

a fundamental and essential deviation from the plans and purposes of the original charter of a railroad company. They first contemplated the construction and operation under one management of a continuous road through several States chartered by each and practically consolidated into a single company. The amended charter created a distinct and separate company for the construction of a fragmentary part of the road which might never be extended. It was held that subscribers to the stock of the first company who did not assent to the modifications made in the original charter, were relieved from liability to the superseding railroad company.¹ "The power of the legislature has its limits. It can repeal or suspend the charter ;

kinsville, 81 Ky. 1. Where a bank obtains property for a debt and expends money on it, either to preserve it, or to continue the business in which the property is used, in order to pay the debt, the bank does not thereby exceed its corporate powers by engaging in a business beyond the scope and object of its creation. *Reynolds v. Simpson*, 74 Ga. 454.

¹ *First Nat. Bank v. Charlotte*, 85 N. C. 433. See *Nugent v. Supervisors*, 19 Wall. 241 ; *Fulton Co. v. Miss. & Wab. R.R. Co.*, 21 Ill. 338 ; *Ross v. Chicago, Burlington, etc., R.R. Co.*, 77 Ill. 127 ; *Fry v. Lexington, etc., R.R. Co.*, 2 Metc. Ky. 314. A county, or other municipal corporation has no inherent right of legislation, and cannot subscribe for stock in a public improvement, unless authorized to do so by the legislature. But the legislature may, unless restrained by the constitution, authorize a municipal corporation to take stock in a railroad or other work of internal improvement, to borrow money to pay for it, and to levy a tax to repay the loan ; and this authority can be conferred either with or without the sanction of a popular vote. *Thom-*

son v. Lee County, 3 Wall. 327 ; *City of San Antonio v. Lane*, 32 Texas, 405. Railroads, "as matter of usage, founded on experience, are considered by the courts as in the nature of improved highways, and as indispensable to the public interest, and the successful pursuit even of local business, and the legislature may authorize the towns and counties of a State through which a railroad passes, to borrow money, issue their bonds, subscribe for the stock of the company, or purchase the same, to aid the railway in constructing or completing such a public improvement." *CLIFFORD, J.*, in *St. Joseph Township v. Rogers*, 16 Wall. 644. Where a statute provided that the supervisor who executed town bonds to aid in the construction of a railroad should determine whether an election had been held, and whether a majority of the votes cast were in favor of the subscription, and he passed upon that question, subscribed for the stock, and executed and delivered the bonds, it was held too late to object to the validity of the bonds in the hands of an innocent holder. *Ibid.*

it can alter or modify it; it can take away the charter; but it cannot impose a new one, and oblige the stockholders to accept it. It can alter or modify the old one; but the power to alter or modify anything can never be held to imply a power to substitute a thing entirely different. It is not the meaning of the words in their usually received sense.¹ A railroad company which has received from individuals gifts of land, subscriptions to its stock, and money in consideration that it will locate its road on a particular route, and permit private side track and warehouse accommodations, will not be allowed to change its location by indirection, though not in name, but in substance and in fact, by forming another company and constructing a new road parallel with the former one, which it abandons, without compensating the parties injured.² The corporation must remain substantially the same, and be designed to accomplish the same general purposes, and the same general interests. Privileges or immunities granted by the charter, or afterward conferred upon the corporation by law for a consideration, cannot be withdrawn or changed by legislation.³ But such amendments of the charter may be made as are useful to the public and beneficial to the corporation, and which will not divert its property to new and different purposes, or destroy or impair any of its franchises.⁴ In any event,

¹ *Zabriskie v. Hackensack, etc., R.R. Co.*, 18 N. J. Eq. 178.

² *Chapman v. Mad River, Lake Erie, etc., R.R. Cos.*, 6 Ohio St. 119.

³ *Dodge v. Wolsey*, 18 How. 331; *Jefferson Bank v. Skelley*, 1 Black. 436; *Wilmington R.R. Co. v. Reed*, 13 Wall. 264; *Pacific R.R. Co. v. McGuire*, 20 Id. 36; *Home of the Friendless v. Rouse*, 8 Id. 430; *Slaughter House Cases*, 16 Id. 36; *Gibbons v. Ogden*, 9 Wheat. 1; *Phila., etc., R.R. Co. v. Bowers*, 4 Houst. Del. 506; *Zimmer v. State*, 30 Ark. 677; *Chesapeake Canal*

Co. v. Balt. & Ohio R.R. Co., 4 Gill & Johns. 108; *Hazen v. Union Bank*, 1 Sneed, 115.

⁴ *Buffalo & N. Y. City R.R. Co. v. Dudley*, 14 N. Y. 336; *Banet v. Alton & Sangamon R.R. Co.*, 13 Ill. 504; *Pacific R.R. Co. v. Hughes*, 22 Mo. 291; *Zabriskie v. Hackensack & N. Y. R.R. Co.*, 3 C. E. Green, 178. The right to alter must relate to some matter of public concern, some matter in which the community is interested, and not an alteration or amendment solely of individual advantage where the alter-

before a stockholder will be entitled to an injunction against a departure from the original objects of the incorporation, he must have shown himself prompt and vigilant in the assertion of his rights, otherwise he will be deemed to have acquiesced in the change, or be compelled to seek some other remedy.¹ An amendment may be made which, without materially changing the objects of the charter, simply confers on the corporation additional powers.² The fact that an amendment to the charter of a foreign corporation is in conflict with the law or constitution of the State permitting such corporation to exercise certain powers therein, will not render the amendment invalid,³ unless the alteration impairs the contract between the members.⁴ The charter, and the rights and liabilities of the corporation, may be altered by an act of the legislature; but not lawful private contracts previously made between the corporation as one party, and its stockholders or members as the other.⁵ The question whether an amendment of the charter is material, must be determined by the court.⁶

§ 140. **Conditional grant.**—When rights and privileges are conferred upon a corporation by its charter upon condition that the corporation shall do certain things, or incur certain obligations, the legislature cannot, after the conditions have been fulfilled, impair its grant by changing them;⁷ rights

ation seriously affects rights of property previously acquired and paid for by the corporation. *Milliman v. Oswego & Syracuse R.R. Co.*, 10 Barb. 87. Such a reservation does not give the power to alter vested rights acquired under the charter or to add new parties without the consent of the corporation. *Sage v. Dillard*, 15 B. Mon. 340. See *Miller v. N. Y. & Erie R.R. Co.*, 21 Barb. 513; *Com. v. Essex Co.*, 13 Gray, 239; *Yeatton v. Bank of the Old Dominion*, 21 Gratt. 593.

¹ *Chapman v. Mad River, Lake Erie, etc., R.R. Cos.*, *supra*.

² *Peoria, etc., R.R. Co. v. Preston*,

35 Iowa, 115; *Schenectady, etc., Plank R. Co. v. Thatcher*, 11 N. Y. 102; *Buffalo & N. Y. City R.R. Co. v. Dudley*, 14 Id. 336.

³ *Covington v. Covington, etc., Bridge Co.*, 10 Bush. 69.

⁴ *Aspinwall v. Ohio & Miss. R.R. Co.*, 20 Ind. 492.

⁵ *Oldtown & Lincoln R.R. Co. v. Veazie*, 39 Me. 571.

⁶ *Memphis Branch R.R. Co. v. Sullivan*, 57 Ga. 240.

⁷ *Monongahela Nav. Co. v. Coon*, 6 Pa. St. 379; *Washington Bridge Co. v. State*, 18 Conn. 53; *Com. v. New Bedford Bridge Co.*, 2 Gray, 339.

which have been thus acquired, and become vested under a legitimate exercise of the powers granted, being inviolable. In Massachusetts, the statute of 1845, creating a corporation for the purpose of constructing a dam across the Merrimac River, required the company to make and maintain in the dam suitable and reasonable fish-ways, to be kept open at such seasons as were necessary and usual for the passage of fish. By an additional act, passed in 1848, the company was authorized to increase its capital stock upon condition that "said company shall be liable for all damages which shall be occasioned to the owners of fish rights existing above the said company's dam, by the stopping or impeding the passage of fish up and down the Merrimac River by the said dam." This act was duly accepted by the company, and pursuant thereto it paid the sum of \$26,000 to various owners of fish rights as damages for hindering or impeding the passage of fish by the said dam. Eight years afterward, an act was passed, requiring the company, under a heavy penalty, to make, and forever thereafter maintain in and around its dam, a suitable and sufficient fish-way for the usual and unobstructed passage of fish during the months of April, May, June, September, and October, in every year. It was held that after the State had entered into a contract with the company to exempt it from the obligation of making and maintaining a suitable and sufficient fish-way by indemnifying all persons injured in their several fisheries, and the company had performed its part of the contract by the payment of a large sum of money, it was not competent for the legislature, without any change of circumstances, under its authority to amend the charter of the company, to pass a law requiring it to do acts from which, by the terms of such contract, it had been exempted, and that consequently the last-mentioned act was void.¹

¹ *Com. v. Essex Co.*, 13 Gray, 239.

§ 141. **Where the grant is without consideration.**—A privilege or immunity which constitutes a mere license, until acted upon, may be withdrawn by the legislature at any time.¹ It was provided by the charter of a State bank that the bills of the bank, payable in gold or silver coin, should be received at the treasury of the State, and by tax collectors in payment of taxes. Afterward, acts were passed, virtually prohibiting the receipt of such bills for taxes; and it was held that such acts were valid, the privilege in question being wholly gratuitous.² The first section of the law of a State, of 1864, provided that all lands thereafter acquired by a certain railroad, and of which the title in fee might become vested in said company pursuant to the act of Congress and the laws of the State, should be exempt from taxation for ten years. The second section provided that in case any such lands were sold, contracted to be sold, leased, or conveyed by the company, they should become subject to taxation immediately, with the proviso that the lands might be mortgaged for the purpose of raising funds to build the railroad, without being subject to taxation. By the act of 1870, the time mentioned in the act of 1864 was extended ten years, upon condition that the company should complete its road within two years. A clause in the constitution of the State in terms declared that all general laws or special acts under which corporations without banking powers were created, might be altered or repealed by the legislature at any time after their passage. In 1871 the legislature repealed the exemption as to certain lands, and it was held that the repealing act was valid.³ Several

¹ *Christ Church Hospital v. Phila. County*, 24 How. 300; *Hewitt v. N. Y. etc., R.R. Co.*, 12 Blatchf. 452; *West Wis. R.R. Co. v. Supervisors*, 93 U. S. 595; *People v. Commrs. of Taxes*, 47 N. Y. 501; *St. Louis, etc., R.R. Co. v. Loftin*, 30 Ark. 693; *Philadelphia &*

Co.'s Appeal, 102 Pa. St. 123; *Johnson v. Crow*, 87 Id. 184; *Salt Co. v. East Saginaw*, 13 Wall. 373.

² *Manf. Co. v. Roper*, 15 Rich. 138.

³ *West Wis. R.R. Co. v. Trempealeau Co.*, 35 Wis. 257.

years after the grant of a charter to a turnpike company, without any reservation of power of revocation or alteration, an act was passed, on the petition of the company, giving it the right to collect an increased amount of tolls on certain vehicles, on the ground that the original limit was established by mistake in recording the bill, or in some other way. It was held that the act was a modification of, and part of, the original grant, and not a mere license, and that the fact that notice of the application was not given to proprietors of vehicles, did not show fraud or make the amendment void.¹

§ 142. **Police regulations.**—When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. From this source come the police powers under which the government regulates the conduct of its citizens one toward another, and the manner in which each shall use his own property when such regulation becomes necessary for the public good. The contracts which the constitution protects are those which relate to property rights not governmental; subjects appertaining to the latter, being dealt with as special exigencies arise. Consequently a legislature cannot curtail the power of succeeding legislatures to make such laws as they deem proper relative to matters of that character.² “In England, from time immemorial, and in this country from its first colonization, it has been customary to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. . . . Looking to the common law, whence came

¹ Derby Turnpike Co. v. Parks, 10 Miss. R.R. Co. v. McClelland, 25 Ill. Conn. 522. 140; Metrop. Board of Excise v. Ber-

² Stone v. Mississippi, 101 U. S. 814; rie, 34 N. Y. 657.
Boyd v. Alabama, 94 Id. 645; Ohio &

the right which the constitution protects, we find that when private property is affected with a public interest it ceases to be *juris privati* only. This was said by Lord Chief Justice HALE more than two hundred years ago in his treatise, *De portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property becomes clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When therefore one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use ; but so long as he maintains the use, he must submit to the control.”¹

It is much easier to perceive and realize the existence and sources of the police power of the State than to mark its boundaries, or prescribe limits to its exercise.² “It aims to regulate the intercourse of citizen with citizen, to prescribe the manner of using one’s property and pursuing one’s occupation, so as not to trespass on the property or rights of others ; and as such, is a power whose necessity and uses grow with the increasing complexities of our civilization, and the increasing diversities in the industries and modes of life. The sphere, therefore, of its operations is ever widening. Every new use to which the forces of nature are put, calls for a new interference of this power,

¹ *Munn v. Illinois*, 94 U. S. 113, per WAITE, C. J., in which it was held that the State of Illinois had power to prescribe the maximum rate of storage of grain in warehouses in Chicago and other places in the State, having not less than one hundred thousand inhabitants, in which grain was stored in

bulk, and in which the grain of different owners was mixed together, or in which grain was stored in such a manner that the identity of different lots or parcels could not be accurately preserved.

² See *Com. v. Alger*, 7 Cush. *84.

that such use may not operate to the injury of others.”¹ “Every such law limits, restrains, impairs, and in some cases destroys the uses which were previously enjoyed of the property so made the subject of legislation; but the extent to which it may do so, does not affect the validity of such laws or their equal application to all owners of such property. They are presumed to be passed for the common good, and to be necessary for the protection of the public, and cannot be said to impair any right, or the obligation of any contract, or to do any injury in the proper and legal sense of these terms.”² It makes no difference how few or how many persons a statute will be likely to affect. If it professes to regulate a matter of public concern and is in terms general, applying equally to all persons or property coming within its provisions, it is sufficient.³

The police power of the State, which is inherent and

¹ Kansas Pacific R.R. Co. v. Mower, 16 Kansas, 573, per BREWER, J.

² Com. v. Intoxicating Liquors, 115 Mass. 153, per ENDICOTT, J. See Brick Presbyterian Church v. New York, 5 Cowen, 538; Vanderbilt v. Adams, 7 Id. 349; Coates v. New York, Ib. 585, 604, 606.

³ In Stone v. Mississippi, 101 U. S. 814, WAITE, C. J., said: “Irrevocable grants and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police. Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power than to give an abstract definition of the power itself which will be in all respects accurate. No one denies, however,

that it extends to all matters affecting the public health or the public morals. . . . It is not always easy to tell on which side of the line which separates governmental from property rights, a particular case is to be put; but in respect to lotteries there can be no difficulty. They are not in legal acceptance of the term *mala in se*, but as we have just seen, may properly be made *mala prohibita*. They are a species of gambling, and wrong in their influences. They disturb the checks and balances of a well-ordered community. . . . Certainly the right to suppress them is governmental, to be exercised at all times by those in power at their discretion. Any one, therefore, that accepts a lottery charter, does so with the implied understanding that the people in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not.”

plenary to prohibit all things hurtful to the comfort, safety, and welfare of society, may be exercised to control the use of property of corporations, as well as that of individuals. So far as the franchises of a corporation are *publici juris*, such legislation is not affected by the clause of the constitution which prohibits the passing of laws impairing the obligation of contracts. It is the province of the legislature to determine when the necessity for calling into exercise this power exists; but the subjects of it are judicial questions.¹ Grants of immunity from legitimate governmental control are never to be presumed. On the contrary, the presumptions are all the other way, and unless an exemption is clearly established, the legislature is free to act on all subjects within its general jurisdiction as the public interests may seem to require.²

The police power of the States with respect to municipal corporations is of an absolute character, involving public interests and public laws, and every succeeding legislature possesses the same jurisdiction and power in relation to them as its predecessors. In 1846 an act of the legislature of Ohio fixed the seat of justice of a county at Canfield, provided that "the proprietors or citizens should give bond with sufficient security, payable to the commissioners of the county, for the sum of \$5,000, to be applied in erecting public buildings for said county, and that the citizens of Canfield should also donate a suitable lot of ground on which to erect public buildings." The citizens complied with the requirements of the law, and the seat of justice remained undisturbed at the place where it had been "permanently established," until 1874, when a law was passed for its removal to another town. On a bill filed for

¹ *Lake View v. Rose Hill Cemetery* Illinois Cent. R.R. Co. v. Illinois, Ib. Co., 70 Ill. 191; *State v. Columbus* 541; *Stone v. Ill. Cent. R.R. Co.*, Ib. *Gas Light, etc., Co.*, 34 Ohio St. 347; *Winona, etc., R.R. Co. v. Blake*, 94 Id. 180; *Georgia R.R. Co. v. Smith*, 70

572.
² *Ruggles v. Illinois*, 108 U. S. 526; Ga. 694.

an injunction restraining the county commissioners from effecting the removal on the ground that the original act, and what was done under it, constituted an executed contract on the part of the State that the seat of justice should remain forever at Canfield, and the latter act impaired the obligation of that contract. It was, however, held that no such contract existed.¹ A law was passed in 1813 by the legislature of New York, giving to the city of New York, power to pass ordinances regulating, and if necessary preventing, the interment of dead bodies within the city; and a penalty of \$250 was authorized to be imposed for the violation of the prohibition. In 1823, an ordinance was adopted, forbidding interments or the depositing of dead bodies in vaults in the city, south of a designated line. An action having been brought to recover the penalty for depositing a dead body in a vault in Trinity churchyard, a plea set forth that the *locus in quo* was granted by the king of Great Britain on the 6th of May, 1697, to a corporation by the name of the Rector and Inhabitants of the City of New York in Communion with the Protestant Episcopal Church of England, and their successors forever, as and for a churchyard and burying-place, with the rights, fees, etc.; that immediately after the grant, the land was appropriated, and thenceforward was used as and for a cemetery for the interment of dead bodies; that the rector and wardens of Trinity church were the same corporation; and that the body in question was deposited in the vault in the churchyard by the license of that corporation. It was held that the act under which the ordinance was passed was not unconstitutional, either as impairing the obligation of contracts, or taking property for public use, without compensation, but stood on the police power to make regulations in respect to nuisances. It was said that "Every right, from absolute ownership in property down to a mere ease-

¹ *Newton v. Commissioners*, 100 U. S. 548.

ment, is purchased and holden subject to the restriction that it shall be so exercised as not to injure others. Though at the time it be remote and inoffensive, the purchaser is bound to know, at his peril, that it may become otherwise by the residence of many people in its vicinity, and that it must yield to by-laws and other regular remedies for the suppression of nuisances."¹ In such cases, prescription, whatever the length of time, has no application. Every day's continuance is a new offense, and it is no justification that the party complaining came voluntarily within its reach. Pure air and comfortable enjoyment of property are as much rights belonging to it, as the right of possession and occupancy. If population, where there was none before, approaches a nuisance, it is the duty of those liable at once to put an end to it.²

Where a corporation was created to establish and maintain chemical and other works at a place designated for the purpose of manufacturing and converting dead animals and other animal matter into an agricultural fertilizer, and into other chemical products, to have continued succession and existence for the term of fifty years, it was held that the charter could not be regarded as a contract guaranteeing in the locality originally selected exemption for fifty years from the exercise of the police power of the State, however serious the nuisance might become in the future, by reason of the growth of population around it.³ A statute providing that it shall be unlawful to sell milk containing less than thirteen per cent. of milk solids, belongs to the class of police regulations designed to prevent frauds and to protect the health of the people, and is constitutional.⁴ In *Beer Co. v. Massachusetts*,⁵ BRADLEY, J., in delivering the opinion

¹ Coates agst. New York, 7 Cowen, 585.

² Brady v. Weeks, 3 Barb. 157.

³ Fertilizing Co. v. Hyde Park, 97 U. S. 659.

⁴ Com. v. Evans, 132 Mass. 11. See Bancroft v. Cambridge, 126 Mass. 438; Com. v. Luscomb, 130 Id. 42.

⁵ 97 U. S. 25.

of the Supreme Court of the United States, said : "The plaintiff in error was incorporated for the purpose of manufacturing malt liquors in all their varieties, it is true, and the right to manufacture, undoubtedly, as the plaintiff's counsel contends, included the incidental right to dispose of the liquors manufactured. But, although this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor; nor as exempting the corporation from any control therein to which a citizen would be subject if the interests of the community should require it. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State."¹ The charter of a university provided that intoxicating liquors for other than medicinal or mechanical purposes, if sold within a mile of the university should be deemed a nuisance. Afterward, an act was passed, giving the mayor and city council, where the university was situated, power to grant or refuse licenses for the sale of liquor within the city limits. It was held that the act did not give the university a right to sell liquor within those limits, and if it had, being a mere police regulation, the legislature could have revoked it at pleasure.²

A company having been incorporated to manufacture cotton and woolen goods, several years afterward a law was passed, providing that no minor under the age of eighteen years, and no woman over that age, should be employed in laboring by any person, firm, or corporation, in any manufacturing establishment in the State, more than ten hours in any one day, with certain exceptions; and that in no

See *Boyd v. Alabama*, 94 U. S. 645.

² *Dingman v. People*, 51 Ill. 277.

case should the hours of labor exceed sixty per week. It was held that this law might be sustained, either as a health or police regulation, and that it did not violate any contract implied in the charter.¹

The property of an inventor in a patented machine, like all other property, remains subject to the paramount claims of society, and the manner of its use may be controlled and regulated by State laws when the public welfare requires it. When the beneficial use of patented property, or any species of property, requires public patronage and governmental aid, as, for instance, the use of public ways and the exercise of the right of eminent domain, the State may impose such conditions and regulations as in the judgment of the law-making power are necessary to promote the public good.²

The legislature may regulate the mode in which railroad corporations shall transact their business, the speed at which they may run their trains, the way in which they may cross or run upon highways and turnpikes used for public travel, and adopt such measures as are appropriate to protect persons or property carried upon them, or passing upon highways crossed by them, notwithstanding the power to alter and amend the charters of such corporations has not been reserved. Such legislation violates no contract, takes away no property, and interferes with no vested right.³ A rail-

¹ *Com. v. Hamilton Manf. Co.*, 120 Mass. 383.

² *State v. Bell Telephone Co.*, 36 Ohio St. 296; *Western Union Tel. Co. v. Axtell*, 69 Ind. 199.

³ *Fawcett v. Y. & N. M. R.R. Co.*, 2 Eng. L. & Eq. 289; *Norris v. Androscoggin R.R. Co.*, 39 Me. 273; *Gorman v. Pacific R.R. Co.*, 26 Mo. 441; *Trice v. Hannibal, etc., R.R. Co.*, 49 Id. 438; *Ohio, etc., R.R. Co. v. McClelland*, 25 Ill. 140; *Ohio, etc., R.R. Co. v. Brubaker*, 47 Id. 462; *Rockford, etc., R.R. Co. v. Hillmer*, 72 Id. 235; *Chicago, etc., R.R. Co. v. People*, 105 Id. 657;

Bulkley v. N. Y. & N. H. R.R. Co., 27 Conn. 479; *State v. New Haven, etc., R.R. Co.*, 43 Id. 351; *Dean v. Sullivan*, 22 N. H. 316; *Cornwall v. Sullivan R.R. Co.*, 28 Id. 161; *Smith v. Eastern R.R. Co.*, 35 Id. 356; *Nelson v. Vt., etc., R.R. Co.*, 26 Vt. 717; *Thorpe v. Rutland, etc., R.R. Co.*, 27 Id. 140; *Cornwin v. N. Y. & Erie R.R. Co.*, 13 N. Y. 42; *Bruce v. N. Y. Cent. R.R. Co.*, 27 Id. 269; *People v. Boston, etc., R.R. Co.*, 70 Id. 369; *Statts v. Hudson River R.R. Co.*, 3 Keyes, 196; *Waldron v. Rensselaer, etc., R.R. Co.*, 8 Barb. 390; *Pennsylvania R.R. Co. v. Riblet*,

road company being exempt by its charter from ringing a bell or sounding a whistle at a road crossing, an act was passed compelling it to be done. It was held that under the general power to regulate the police of the State the act was binding; the exemption forming no part of the company's franchise.¹ The power of a municipal corporation to govern implies the power to ordain and establish suitable police regulations, and authorizes it to prohibit the use of locomotives in the public streets when such action does not interfere with vested rights.²

Railroad companies, being engaged in a public employment affecting the public interest, are subject to legislative control as to their rates of fare and freight, unless protected by their charters, or unless what is done amounts to a regulation of foreign or interstate commerce.³ The legislature of Ohio, under a provision of the constitution of that State, that "no special privileges or immunities should ever be granted that might not be altered, revoked, or repealed," passed a law prohibiting a railroad company, of which the plaintiff in error was conductor, from charging more than three cents a mile for carrying passengers over their road, and the company required him to charge three and a half

66 Pa. St. 164; *Madison, etc., R.R. Co. v. Whiteneck*, 8 Ind. 217; *New Alb. R.R. Co. v. Tilton*, 12 Id. 3; *Indianapolis R.R. Co. v. Kercheval*, 16 Id. 84; *Same v. Marshall*, 27 Id. 300; *Jones v. Galena R.R. Co.*, 16 Iowa, 6; *Blair v. Milwaukee R.R. Co.*, 20 Wis. 254; *Horn v. Chicago, etc., R.R. Co.*, 38 Id. 463; *Pittsburg, etc., R.R. Co. v. South West Pa. R.R. Co.*, 77 Pa. St. 173; *Mobile & Ohio R.R. Co. v. State*, 51 Miss. 137; *Lake Shore, etc., R.R. Co. v. Cincinnati, etc., R.R. Co.*, 30 Ohio St. 604; *Pennsylvania Co. v. Wentz*, 37 Id. 333; *Veazie v. Mayo*, 45 Me. 560; *Lyman v. Boston, etc., R.R. Co.*, 4 Cush. 288; *Hoyt v. Chicago, etc., R.R.*

Co., 93 Ill. 601; *Kansas Pacific R.R. Co. v. Mower*, 16 Kans. 573.

¹ *Galena & Chicago Union R.R. Co. v. Appleby*, 28 Ill. 283.

² *Railroad Co. v. Richmond*, 96 U. S. 521.

³ *Chicago, etc., R.R. Co. v. Iowa*, 94 U. S. 155; *Laurel Fork, etc., R.R. Co. v. West Va. Transp. Co.*, 25 W. Va. 324. See *Farmers' Loan & Trust Co. v. Stone*, 20 Fed. Rep. 270. On questions of tolls, freight, and fares, courts construe charters most in favor of the public and against the company. *Camden, etc., R.R. Co. v. Briggs*, 22 N. J. (2 Zab.) 623. See *McAunich v. Miss., etc., R.R. Co.*, 20 Iowa, 338.

cents. He endeavored to collect the latter sum, but the passenger refused to pay more than three cents, and the conductor forcibly expelled him from the train. He was prosecuted, convicted, and fined for assault and battery in the State courts, and the conviction was affirmed on error in the Supreme Court of the United States. But the court said: "The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations in such cases are surrounded by the same sanctions, and are as inviolable as in other cases."¹ The power of regulating rates of fare is a power of government continuing in its nature, and if it can be bargained away at all, it can only be done by words of positive grant or something which is in law equivalent. If there is a reasonable doubt, it must be resolved in favor of the existence of the power. Authority given the corporation by its charter to carry persons and property, implies authority to charge a reasonable sum for the carriage. In this way the corporation is put in the same position a natural person would occupy if engaged in the same or like business. The power to charge being coupled with the condition that the charge shall be reasonable, the State is left free to act on the subject of reason-

¹ Shields v. Ohio, 95 U. S. 319. See Ruggles v. Illinois, 91 Ill. 256; Ill. Cent. R.R. Co. v. State, 95 Id. 313; Mobile, etc., R.R. Co. v. Steiner, 61 Ala. 559. The right of a railroad company to make reasonable charges for freight and passengers is a vested corporate right. Rates of compensation supposed to be reasonable may be prescribed by law until held otherwise by the courts. Discrimination may be prohibited; but

a difference in rates based on the distance carried, is not discrimination. Koehler, *ex parte*, 23 Fed. Rep. 529. In Ladd v. Southern Cotton Press, etc., Co., 53 Texas, 172, it was held that a cotton buyer could not maintain an action against a corporation engaged in the business of warehousing and compressing cotton, to recover back alleged excessive charges paid for handling cotton for him.

ableness within the limits of its general authority as circumstances may require. But this power of limitation or regulation is not of itself without limit. It is not a power to destroy, and limitation is not equivalent to confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law. General statutes regulating the use of railroads in a State, or fixing maximum rates of charges for transportation, when not forbidden by charter contracts, do not necessarily deprive the corporation owning or operating a railroad within the State of its property without due process of law, within the meaning of the fourteenth amendment of the Constitution of the United States, nor take away from the corporation the equal protection of the laws.¹

When a railroad company is incorporated by the legislature of several States for the construction of a continuous line of interstate communication, the corporation created by each State is for all the purposes of local government a domestic corporation, and its railroad within the State a matter of domestic concern. Every corporation within the territorial limits of a State, while there, is subject to the constitutional authority of the State government, which may regulate freights and fares for business done exclusively within the State, and prevent the company from discriminating against persons and places there. So it may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. It may require the company to fence so much of its road as lies within the State; to stop its trains at railroad crossings; to slacken speed while running in a crowded thoroughfare; to post its tariffs and time-tables

¹ *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307.

at proper places, and other things of a kindred character affecting the comfort, the convenience, or the safety of those who are entitled to look to the State for protection against the wrongful or negligent conduct of others.¹

A corporation cannot lawfully be deprived of any of the essential rights and privileges conferred by its charter under the pretence of police regulations. Where a company was authorized by its charter to acquire land not exceeding five hundred acres for a cemetery, and having purchased the same and expended money in preparing and beautifying it, a law was passed prohibiting the company from burying the dead outside of its then inclosure without reference to the manner its purchase was exercised, it was held that such law impaired the obligation of the contract contained in the charter, and was therefore void.²

§ 143. Release from obligations.—Obligations imposed upon a corporation for the public benefit may be released without impairing the corporate rights, and consequently without the consent of any of the members.³ A modification of the charter in enlarging the time of commencing and completing certain work, is one of those incidents which comes within the constitutional power of the State to exercise, and with due notice of which all its citizens must be presumed to contract. "It is not one of those fundamental, radical changes which diverts the funds from the original purpose to which they were dedicated, or is manifestly prejudicial to the stockholder; but it comes within that class of cases in which the change is auxiliary to the

¹ *Stone v. Farmers' Loan & Trust Co.*, *supra*. The statute of Iowa of March 23, 1874, fixing maximum charges for passengers and freight over interstate lines is unconstitutional, Congress alone having the power to regulate interstate commerce. *Kaiser v. Ill. Cent. R.R. Co.*, 18 Fed. Rep. 151; *S. C. 5 McCrary C. C.* 496.

The same as to the Tennessee acts of 1883, ch. 199. *Louisville, etc., R.R. Co. v. Tennessee R.R. Commission*, 19 Fed. Rep. 679.

² *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191.

³ *Joy v. Jackson, etc., Plank R. Co.*, 11 Mich. 155; *Eastern R.R. Co. v. Boston, etc., R.R. Co.*, 111 Mass. 125.

original object of the corporation and beneficial to the stockholders."¹ A railroad company may be released from a duty imposed by its charter to connect its road with another line.² And where the capital of a corporation having been expended, it is evident that unless funds are raised the stock already taken must be sacrificed and the enterprise itself prove a failure, a law may be passed authorizing the issuing of preferred stock, thus enabling the corporation to obtain money by pledging its revenue, instead of mortgaging its corporate property.³ The charter of a charitable institution gave it power to hold property not exceeding in value \$200,000. A person donated to the institution \$50,000, and by his will left the residue of his estate, after the payment of debts and legacies, in trust for the benefit of the institution, directing the trustees to invest said residue, and when by the accumulation of interest it should amount to \$200,000, to pay it to the institution. After the testator's death an act was passed authorizing the corporation to hold property in excess of the original sum named in the charter, and at the time of the settlement of the estate the residue* amounted to more than \$200,000. It was held that the institution was entitled to the entire fund.⁴

§ 144. Right to enact changes in methods of legal procedure.—General legislative power over the remedy may be exercised when it does not affect injuriously any corporate right, or subject the corporation to any additional loss or liability. There is a difference between those rights upon which the validity of the contracts and other transactions of the corporation depends, and the peculiar remedies prescribed for their enforcement. The first enter into and

¹ Taggart v. Western Md. R.R. Co., 24 Md. 563, per BOWIE, C. J., referring to Pierce on R.R. Law, 78 n.

² Wilson v. Wills Valley R.R. Co., 33 Ga. 470.

³ Covington v. Covington, etc., Bridge Co., 10 Bush. Ky. 69.

⁴ Baker v. Clarke Inst., 110 Mass. 88.

constitute an essential element in the contracts and transactions themselves, and cannot be violated. The last may be to some extent subject to legislative control, without in any degree impairing such rights, or injuring the corporation; and the right of the legislature to exercise power to this extent, is unquestionable.¹ Thus, a law may be passed, requiring process to be served on railroad companies in a different way from that provided in the charter of a company previously granted.² Where the charter contained a clause that it should not be revoked, annulled, altered, limited, or restrained, without the consent of the corporation, except by due process of law, and that there should not be any subsequent imposition "of any other or future duties, liabilities, or obligations," it was held that the remedy for the security of the rights of the corporation, and to compel the performance of its liabilities as to the mode, the time when, and the courts where they should be enforced, was not placed beyond legislative control.³

§ 145. Amendment of charter by consent of corporation.—A State constitution is a limitation upon, and not a grant of, legislative power; all legislative power being inherent in the legislature, unless withheld by the organic law. The fact that the constitution recognizes the existence of a corporation, does not render its charter a part of the organic law, so as to preclude an amendment of the charter by the legislature with the assent of the incorporators.⁴ The assent

¹ Howard v. Ky. & Louisville Mu. Ins. Co., 13 B. Mon. 282; Young v. Bank of Alexandria, 4 Cranch, 384; Bank of Columbia v. Okely, 4 Wheat. 235; Read v. Frankfort Bank, 23 Me. 318; Com. v. Farmers' & Mechanics' Bank, 21 Pick. 542; Com. v. Cochituate Bank, 3 Allen, 42; New Albany R.R. Co. v. McNamara, 11 Ind. 543; Lewis v. City Bank, 12 Ohio St. 174; Rensselaer v. Snyder, 13 N. Y. 299;

Conkey v. Hart, 14 Id. 22; Penniman's Case, 103 U. S. 714; U. S. v. Union Pacific R.R. Co., 98 Id. 569; Terry v. Anderson, 95 Id. 628. See Pritchard v. Norton, 106 U. S. 124; Edwards v. Kearzey, Ib. 595.

² Railroad Co. v. Hecht, 95 U. S. 168; 29 Ark. 661.

³ Gowen v. Penobscot R.R. Co., 44 Me. 140.

⁴ People v. Marshall, 1 Gilman, Ill. 672.

of the corporation may be inferred from such circumstances of commission or omission as would raise a similar presumption in favor of a natural person.¹ Although the original charter of a company contains no reservation of power to amend it, yet if the company accept a grant of additional privileges and powers, on the terms that the legislature may "alter, amend, or annul the charter of the company at any time thereafter," the company thereby surrenders the inviolability of the contract to the discretion of the legislature.² There is an inherent right in the legislature to amend or change the charter of a corporation with its consent. Those who become corporators do so with that contingency, and their engagements are therefore subject to it. If a subscriber to stock enters into the corporation generally, without specific stipulations, he is bound and concluded by the action of a majority of the corporators; and if the legislature change or amend the charter on the application of the company, and with its assent and approval, without impairing the contract of the corporators, they will not thereby be discharged from their liability as subscribers to stock. Such a change as would not increase the liability of the party to pay more money than he subscribed originally to pay, but merely affect his individual or personal interest,—as that a road did not pass his door, or through his farm, as he desired or expected,—would not be such a change as would absolve the party from his obligation to pay his subscription.³

¹ *Com. v. Cullen*, 13 Pa. St. 133; *R.R. Co. v. Wilson*, 22 Conn. 435; *Bedford R.R. Co. v. Bowser*, 48 Id. 29; *Payson v. Stoeve*, 2 Dillon, 427.

Gifford v. N. J. R.R. Co., 10 N. J. Eq. 176; *Memphis Branch R.R. Co. v. Sullivan*, 57 Ga. 240; *Kennebec, etc., R.R. Co. v. Palmer*, 34 Me. 366; *Monongahela Nav. Co. v. Coon*, 6 Pa. St. 379.

Booker, ex parte, 18 Ark. 338; *Vt., etc., R.R. Co. v. Vt. Cent. R.R. Co.*, 34 Vt. 2; *International, etc., R.R. Co. v. Bremond*, 53 Texas, 96; *Danbury, etc., Delaware R.R. Co. v. Thorp*, 1 Houst. Del. 149. The English courts seem to make a distinction between mere private corporations acting exclusively for the benefit of their members, as banking and other similar in-

§ 146. **Reservation by State of power over corporations.**—In order to preserve State control over acts of incorporation, the power to repeal, alter, or amend them has sometimes been reserved in the constitution, or in general laws on the subject, or in special acts of incorporation; and whenever it is so reserved, its exercise does not impair the contract of which it forms a constituent part.¹ Every individual who subscribes to the stock of the corporation is bound by this condition, and whatever modification is thus effected by his subscription, is made by his own agreement, entered into at the moment he became a party to the contract, and is as binding upon him as if it had been accomplished at his solicitation and by his procurement;² and the exercise of the power is not subject to review by the courts, unless some principle of natural justice has been violated.³ In

stitutions, and railroad companies, which must be considered as acting partly with a view to the public interest, in consideration of which they obtain from the government the right to take compulsorily the land of private individuals for the use of the road. In *Ware v. Grand Junc. Wat. Co.*, 2 Russ. & Mylne, 470, Lord BROUGHAM refused to restrain a railroad company from applying to Parliament for an enlargement of its powers, and for fundamental changes in its constitution, on the ground that it was the right of the company to procure these changes if it desired them; and that all who became stockholders did so with their eyes open to this power of the majority over the constitution of the society. See *Ffooks v. Lond. & S. W. R.R. Co.*, 19 Eng. L. & Eq. 7. See *Lyde v. Eastern Bengal R.R. Co.*, 36 Beav. 10.

¹ *Pennsylvania College Cases*, 13 Wall. 213; *Sprigg v. Western Tel. Co.*, 46 Md. 77; *Zabriskie v. Hackensack, etc., R.R. Co.*, 18 N. J. Eq. 185; *Com. v. Fayette Co. R.R. Co.*, 55 Pa. St. 452; *Cross v. Peach Bottom R.R.*

Co., 90 Id. 395; *West Wisconsin R.R. Co. v. Trempealeau County*, 35 Wis. 257; *Atty. Genl. v. R.R. Cos.*, *Ibid.* 560; *Mowrey v. Indianapolis, etc., R.R. Co.*, 4 Biss. 78; *Pacific R.R. Co. v. Renshaw*, 18 Mo. 213.

² *Northern R.R. Co. v. Miller*, 10 Barb. 260. "In a multitude of cases decided in England and this country, it has been determined that a subscriber for the stock of a company is not released from his engagement to take it and pay for it by any alteration of the organization or purposes of the company which, at the time the subscription was made, were authorized either by the general law or special charter; and a clear distinction is recognized between the effect of such alterations, and the effect of those made under legislation subsequent to the contract of subscription." *Nugent v. Supervisors*, 19 Wall. 241.

³ *Lothrop v. Stedman*, 13 Blatch. 134; 42 Conn. 583; *Sala v. New Orleans*, 2 Woods, 188. A prohibition, reservation, or exception in a charter will be binding, though it destroy or

such case, the legislature may impose any additional condition or burthen connected with the grant essential to the protection or welfare of the public, and which might with justice originally have been imposed.¹ A provision in a charter that it shall not be altered in any other manner than by an act of the legislature, amounts to an express reservation of power by the legislature to amend the charter without the consent of the incorporators.² When an act of incorporation reserves the power to alter the charter, the number of votes required for such alteration by the constitution in force when the charter was granted, is not requisite to the validity of the act altering the charter; but it is sufficient that the act is passed pursuant to the provisions of the existing constitution.³ The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the State.⁴ But, although the legislature "may reserve the right to revoke or change its own grant of chartered rights, it cannot reserve a right to invalidate contracts between third parties; as that would enable it to reserve the right to impair the validity of all contracts, and thus evade the inhibition of the Constitution of the United States."⁵ The expression that a charter is a contract must be understood to refer to a private corporation with an irrevocable charter. An act granting an exemption from taxation, and providing for future alteration or repeal, confers a mere privilege, which is nothing more than a legislative concession voluntarily made, subject at any time to be withdrawn or modified, whenever the legislature may deem it expe-

make nugatory all the powers given to the corporation. *Talmadge v. North Am. Coal and Transportation Co.*, 3 Head, Tenn. 337.

¹ *English v. New Haven & Northampton Co.*, 32 Conn. 240.

² *Com. v. Bonsall*, 3 Whart. 559.

³ *Matter of Reciprocity Bank*, 29 Barb. 369; S. C. 17 How. Pr. R. 323.

⁴ *Tomlinson v. Jessup*, 15 Wall. 454.

⁵ *Miller v. State*, *Ibid.* 499, per BRADLEY, J.

dient for the public interests.¹ An act reserving power to repeal or amend the charter remains in force until repealed. An act of incorporation passed in 1856 contained this clause: "The legislature reserves the right to alter, amend, and annul this charter at any time hereafter, provided that no injustice be done to the incorporators." In 1862 a supplement to the charter provided that the capital stock and dividends of the corporation should not be taxable. In 1868 an act was passed declaring that the capital stock of all corporations doing business in the State, except banks, savings institutions, and foreign insurance companies, should be subject to taxation. It was held that the last-named act repealed the previous one, and that the corporation was liable to the payment of taxes.² There is no rule of law prohibiting the repeal of a special charter by a general law;³ nor forbidding such repeal without the use of express words declarative of the legislative intent to repeal the earlier statute. "Repeals by implication are not favored. But the question is always one of legislative intent; and the intent to abrogate the particular enactment in an earlier statute by a general enactment in a later statute, is sufficiently manifested where the provisions of the two enactments are so inconsistent that they cannot stand together."⁴

¹ *State v. Commrs. of R.R. Taxation*, 37 N. J. 228; *Rector of Christ Church v. County of Phila.*, 24 How. 300; *People v. Commrs. of Taxes*, 47 N. Y. 501.

² *Union Improvement Co. v. Com.*, 69 Pa. St. 140. And see *Matter of Reciprocity Bank*, 29 Barb. 369. An act of the legislature of Missouri created an institution of learning, the government of which was committed to a board of curators to be elected by a joint vote of the senate and house of representatives, and to be removable at the pleasure of the legislature. H. was elected a professor of mathematics for the term of six years "subject to

law." Four years afterward an act was passed vacating the offices of all the professors, tutors, and teachers connected in any manner with the university, and providing for the election of a new board of curators; and a successor to H. was elected and placed in possession of the professorship. It was held competent for the legislature to shorten the term of H. *Head v. The University*, 19 Wall. 526, affirming *S. C.* 47 Mo. 220.

³ *Mechanics' and Traders' Bank v. Bridges*, 1 Vroom, 112.

⁴ *State v. Commrs. of R.R. Taxation*, 37 N. J. 228, per DEPUE, J. And see

Where a law reserves the power to alter, etc., corporate charters generally, a charter subsequently granted may be amended, although it contains no reservation by that legislature of power to change it; such general act being taken as forming part of all charters afterward granted.¹ And the rule is the same with reference to a grant of franchises and privileges subsequent to such general law, although the charter was created previous thereto.² But a subsequent legislature may enter into an irrepealable contract with a corporation, notwithstanding a previous legislature had reserved the power to alter or repeal the charter.³ Under the general banking law of New York declaring that members of banking associations should not be individually liable for the debts of the association unless it was so provided in the articles of organization, the Supreme Court of the United States held that a subsequent statute, imposing such a liability upon the shareholders of the association, was valid, as the charter reserved to the legislature the power to alter or repeal the act of incorporation. Such a conclusion was objected to, the conditional exemption from such liability being embodied in the articles of association. But the court overruled the defense, upon the ground that the reservation in the charter of the right to alter or repeal the act was controlling.⁴ Jessup, a stockholder in the

Union Improvement Co. v. Com., 69 Pa. St. 140; Bangor R. Co. v. Smith, 47 Me. 34.

¹ Mass. Genl. Hospital v. State Mu. Life Ass. Co., 4 Gray, 227; Suydam v. Moore, 8 Barb. 358; Tomlinson v. Branch, 15 Wall. 460; Miller v. State, 1b. 478; Holyoke Co. v. Lyman, 1b. 500; Griffin v. Ky. Ins. Co., 3 Bush. 592; State v. Person, 32 N. J. 134.

² State v. Commrs. of R.R. Taxation, *supra*.

³ New Jersey v. Yard, 5 Otto (95 U. S.) 104.

⁴ Sherman v. Smith, 1 Black. 587.

And see Miller v. State, *supra*. By the New York revised statutes the charter of every corporation thereafter to be granted by the legislature was declared to be subject to alteration, suspension, or repeal, in the discretion of the legislature. This provision incorporated itself into and became part of every special charter which was itself silent as to the power of repeal or change. Prior to the passage of the general banking law of New York, corporations, with a few unimportant exceptions, were created by special law. The legislation referred to showed a

Northeastern Railroad Company, a corporation created in 1851 by the State of South Carolina, filed a bill against Tomlinson and other officers of the State to enjoin them from levying a tax upon the property of the road. When the company was incorporated there was a general law providing that the charter of every corporation subsequently granted, and any renewal, amendment, or modification thereof, should be subject to amendment, alteration, or repeal, unless expressly excepted from the operation of that law. In 1855 an amendment of the charter exempted from taxation during the continuance of the charter the stock of the company and other real estate it then owned, or might thereafter acquire; but there was no clause in the amendatory act excepting it from the provisions of the above-mentioned general law. The constitution of South Carolina of 1868 subjected the property of corporations then existing to taxation, and by subsequent legislation the property of the railroad company was taxed. It was held that the property was liable to taxation, and the bill was dismissed. FIELD, J., in delivering the opinion of the court, said: "It is true that the charter of the company, when accepted by the incorporators, constituted a contract between them and the State, and that the amendment, when accepted, formed a part of the contract from that date, and was of the same obligatory character. And it may be equally true, as stated by counsel, that the exemption from taxation added greatly to the value of the stock of the company, and induced the plaintiff to purchase

determination on the part of the legislature to make the grant of corporate franchises revocable. *Matter of Lee & Co.'s Bank*, 21 N. Y. 9. The act of Kentucky of Feb. 14, 1856, providing that all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of

the legislature, unless a contrary intent be therein plainly expressed, was intended to secure the rights of beneficiaries and others, vested under the charter before its amendment or repeal, and does not affect the power to repeal the franchise. *Griffin v. Ky. Ins. Co.*, 3 Bush. 592.

the shares held by him. But these considerations cannot be allowed any weight in determining the validity of the subsequent taxation. The power reserved to the law of 1841 authorized any change in the contract as it originally existed, or was subsequently modified, or its entire revocation. The original corporators, or subsequent stockholders, took their interest with knowledge of the existence of this power, and of the possibility of its exercise at any time in the discretion of the legislature. The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve the State control over its contract with the corporators, which without that provision would be irrevocable, and protected from any measure affecting its obligation."¹

A statute providing that every act of incorporation shall "at all times be subject to amendment, alteration, or repeal, at the pleasure of the legislature," reserves to the legislature authority to make any alteration or amendment in a charter granted subject to it, that will not defeat or substantially impair the object of the grant, or any rights which have vested under it and that the legislature may deem necessary to secure that object, or other public or private rights. Under such a clause the stockholders of a bank may be made liable for the future debts of the corporation. The measure may be varied, and the proportion be enlarged of the profits which a mutual life insurance company is required by the terms of its charter to pay to a charitable institution; and railroad companies may be compelled to change the level, grade, and surface of the road-bed, and make new crossings or station-houses different from those

¹ Tomlinson v. Jessup, 15 Wall. 454.

required by the charter, or by the law when the charter was granted.¹

When the legislature grants certain powers and privileges to be exclusively exercised and enjoyed, reserving the power to cancel the grant and to annul the same whenever such privileges are misused or abused, the legislature is the judge as to the commission of such abuse or misuse.²

An amended charter attaches itself to all the qualities and privileges of the original one.³ "Beyond the sphere of the reserved powers, the vested rights of property of corporations are surrounded by the same sanctions, and are as inviolable, as in other cases."⁴

§ 147. **Restricted to authority conferred by charter.**—Although a corporation, in accomplishing the purposes of its creation, may resort to any means that would be necessary and proper for an individual under similar circumstances, unless prohibited by its charter or by some public law;⁵ yet all power rightfully exercised by corporate bodies being conferred by the government, either in express terms or by clear implication, authority for every corporate act must be found in the grant or requirement of some legislative act.⁶ It follows that no vote or act of a corporation can enlarge its chartered authority, either as to the subjects on

¹ *Commrs. v. Holyoke Water Power Co.*, 104 Mass. 446, referring to *Sherman v. Smith*, 1 Black. 587; *Matter of Lee & Co.'s Bank*, 21 N. Y. 9; *Mass. Genl. Hospital v. State Ass. Co.*, 4 Gray, 227; *Roxbury v. Boston & Providence R.R. Co.*, 6 Cush. 424; *Fitchburg R.R. Co. v. Grand Junction R.R. & Depot Co.*, 4 Allen, 198; *Com. v. Eastern R.R. Co.*, 103 Mass. 254; *Albany Northern R.R. Co. v. Brownell*, 24 N. Y. 345.

² *Miners' Bank v. U. S.*, 1 Greene, Iowa, 553.

³ *County of Callaway v. Foster*, 3 Otto (93 U. S.) 567, referring to *State v. Greene Co.*, 54 Mo. 540; *State v.*

Callaway County, Ib. 395; *State v. Sullivan County*, Ib. 522.

⁴ SWAYNE, J., in *Shields v. Ohio*, 95 U. S. 324.

⁵ *Union Bank v. Jacobs*, 6 Humph. 525; *Bank of Augusta v. Earle*, 13 Pet. 519.

⁶ *State v. Washington Soc. Library Co.*, 11 Ohio, 96; *Webster v. The People*, 98 Ill. 343. All the rights of corporations existing previous to the American Revolution remained unchanged by that event. *Soc. for Prop. of Gospel v. New Haven*, 8 Wheat. 464; *Vermont v. Soc. for Prop. of Gospel*, 1 Paine C. C. 652.

which it is intended to operate, or the persons or property of the corporators. If created with a fund limited by the act, it cannot enlarge or diminish the fund; and if the capital stock is divided into a fixed number of shares, this number cannot be changed without authority from the legislature.¹ But the accidental increase in the income of a corporation derived from its vested estates to a point beyond what its charter prescribes, will not divest its title in such estates or in any portion of them. The excess of income in such a case would not belong to the grantor of the property. It would be a question between the corporation and the sovereign power in which individuals would have no concern, and of which they could not avail themselves in any mode against the corporation.² A corporation which is forbidden by its charter to discount notes, and authorized to loan money on bond and mortgage, but on no other security, cannot loan money upon an hypothecation of stock, and take a note as collateral security.³ Where a charter was granted to a company with a specified cash capital, and such other funds as it might receive in trust, and one-half of the capital was required to be invested in bonds or notes secured by mortgage on land in the State, and the remaining half of the capital, together with the premiums and profits received by the corporation, and the trust moneys, might, in the discretion of the corporation, be invested in stocks, or in such real or personal securities as it might deem proper, it was held that the corporation had no power to lend its obligations to pay money in future, and exchange such obligations for the bonds of an individual for the same amount.⁴

¹ *Salem v. Mill Dam Corp.*, 6 Pick. 23.

² *Bogardus v. Trinity Church*, 4 Sandf. Ch. 633; *Humbert v. Trinity Church*, 24 Wend. 587. See *State v. Morristown Fire Assoc.*, 23 N. Y. 195.

³ *North River Ins. Co. v. Lawrence*, 3 Wend. 482. Many corporations—such, for instance, as insurance compa-

nies, religious and charitable corporations, and corporations for literary and scientific purposes—may invest their capital in the stock of other corporations. See *Hodges v. New England Screw Co.*, 1 R. I. 312.

⁴ *Smith v. Ala. Life Ins. & Trust Co.*, 4 Ala. 558.

When a corporation seeks the protection and security of a State charter, it is bound, as a corporation, by the restrictions of the charter, notwithstanding an individual member of the corporation may exercise the right of a citizen and do the same thing on his own responsibility without restriction. Where a person was given an exclusive right to navigate by steam the waters lying in the State of New York, under an act of the State granting to Fulton and Livingston an exclusive right, although it was decided that such grant was in violation of the constitution and laws of Congress, navigable waters being free to all the States and citizens to navigate by steam or otherwise, it was not held or claimed that a State legislature might not charter a corporation to navigate the waters of any State, or even the ocean.¹

§ 148. **When corporate power presumed.**—The dealings of a corporation which on their face or according to their apparent import are within its charter, are not to be regarded as illegal or unauthorized, without some evidence tending to show that they are of such a character. In the absence of proof, there is no legal presumption that the law has been violated. Where a corporation which has no general authority to lend money and discount notes, attempts to enforce a promissory note of which it is the holder, it will be presumed that the note was taken for a debt contracted in the course of some lawful dealing.² A corporation had no general authority to make loans and invest its capital on bond and mortgage; but it could execute trusts and invest trust funds in securities of that nature. It was held that where a loan by such a corporation was contested by the borrower on the ground of a want of power to make it, it was incumbent on him to show affirmatively that the loan

¹ *Gibbons v. Ogden*, 9 Wheat. 1. *Sturges*, 2 Cowen, 664; *Safford v. See Camden & Amboy R.R. Co. v. Wyckoff*, 4 Hill, 442; *Lorillard v. Clyde*, Briggs, 2 Zab. 623; *Gunn v. Cent.* 86 N. Y. 384. See *Express Co. v. Railroad Co.*, 99 U. S. 199.

² *New York Firemen's Ins. Co. v.*

was not made in the proper exercise of the powers granted.¹ Where a corporation is authorized to give a negotiable security for any purpose, and there is nothing to show what the particular security was given for, if the instrument itself does not create a suspicion that it was issued for an illegal object, the court will presume that it was given for a legitimate purpose rather than for a purpose which was unauthorized and illegal.² Although a corporation is forbidden by its charter to deal in anything but bills of exchange, promissory notes, gold and silver, and the produce of its real estate, yet it may take and hold bonds and mortgages to secure debts due it, and its possession of such securities, when there is no evidence to the contrary, will be presumed rightful.³ Where the charter of a bank forbids the discounting by the bank of any paper not falling due within twelve months of its being offered for discount, but a subsequent act provides that when the directors deem it advisable, for the better security of a debt due the bank, it may discount paper having more than twelve months to run, the latter privilege will not be considered in the light of an exception which must be pleaded by the party in whose favor it exists, but as an enlargement of the corporate powers of the bank, and whenever paper having more than twelve months to run is discounted by the bank, the transaction will be *prima facie* valid.⁴

§ 149. Power with reference to place of creation.—Every corporation is created, and its franchises, powers, capacities, duties, and liabilities fixed, limited, and qualified, both in action and in time, by the law of the State granting the charter, and where it has its legal residence.⁵ Although

¹ Farmers' Loan & Trust Co. v. Perry, 3 Sandf. Ch. 339; Same v. Clowes, 3 Comst. 470. See Chautauqua Co. Bank v. Risley, 19 N. Y. 369, overruling s. c. 4 Denio, 487, 488.

² Safford v. Wyckoff, *supra*.

³ Trenton Banking Co. v. Woodruff, 1 Green's N. J. Ch. 117.

⁴ Dockery v. Miller, 9 Humph. 731.

⁵ Blackstone Manuf. Co. v. Blackstone, 3 Gray, 488; Crowley v. Panama R.R. Co., 30 Barb. 99; Chaffee v.

the law of the State can have no direct extraterritorial jurisdiction, yet each government, in determining the conditions of its grant, can confer general powers to be exercised within its bounds, or beyond them by comity. The grant of franchises without restriction, is equivalent to a specific authority to exercise them wherever the corporation may find it convenient or profitable, whether within or without the limits of the State. The rules of comity are subject to local modification; but until so modified, "they have no controlling force or obligation."¹ The mere place where the active agents of a corporation enter into a contract must in general be immaterial. The important question arising must be one of power, not of place. The exercise of the power has relation to the place of legal establishment where the contract may be subsequently acted under. A corporation may therefore by its agents transact business anywhere unless prohibited by its charter, or excluded by local laws. Under such circumstances it may, in order to secure business, consent to be found away from home for the purposes of suit as to matters growing out of its transactions.² With reference to federal jurisdiction, a corporation is regarded as if it were a citizen of the State where it was created, and no averment or proof as to the citizenship of its members elsewhere will be permitted.³

Although the president of a corporation may hire an office in a State other than that of its creation for the

Fourth Nat. Bank of N. Y., 71 Me. 514; Mathews v. Trustees, 2 Brewst. 541; State v. Milwaukee, etc., R.R. Co., 45 Wis. 579.

¹ Merrick v. Van Santvoord, 34 N.Y. 208, reversing S. C. 38 Barb. 574.

² Schollenberger, *ex parte*, 6 Otto, 369; Balt. & Ohio R.R. v. Glenn, 28 Md. 287; Ins. Co. v. Francis, 11 Wall. 210; Vincennes R.R. Co. v. Bank of

North Am., 82 Ill. 493. The meetings of the directors of a business corporation are not analogous to the sessions of a judicial tribunal. The corporation is organized by the election of directors; but the mere organization of the directors into a formal meeting for business afterward, is a different thing. Wright v. Bundy, 11 Ind. 398.

³ R.R. Co. v. Harris, 12 Wall. 65.

transaction of the corporate business,¹ yet it has been held to be the duty of a corporation to keep its principal place of business in the State creating it to an extent necessary to the fullest jurisdiction and visitorial power of the State and its courts.² A railroad company having been incorporated in Indiana with power to extend its road to Cincinnati, Ohio, immediately migrated to Ohio, where it established its office, and where all of its subsequent acts were performed, including the fixing of instalments and times of payment for stock. The legislature of Ohio authorized the corporation to extend its railroad in that State. It was held that the corporate acts performed in Ohio were void.³ Where a corporation created in Florida kept its books and records in Massachusetts, in which its president and other officers resided, it was held not thereby divested of its character as a foreign corporation, nor its trustees deprived of immunity from prosecution for its debts.⁴

§ 150. Rights and powers of foreign corporations.—A body corporate must be treated as a separate corporation by the

¹ *Steamboat Co. v. McCutcheon*, 13 Pa. St. 13.

² *State v. Milwaukee R.R. Co.*, 45 Wis. 579; *Land Grant R.R. v. Commrs. of Coffey County*, 6 Kans. 245. Where a corporation was required by its charter to keep its office in the State, but, notwithstanding this requirement, it kept its office in another State, it was held that the presentation of its note for payment at the latter office was sufficient. *Merrick v. Burlington & Warren Plank R. Co.*, 11 Iowa, 74. Although a corporation be required by its charter to pay only such orders or warrants as are signed by the president and countersigned by the secretary, yet demand and payment of a note executed in behalf of the corporation by the secretary alone, may be

made at the treasurer's office in order to bind the indorsers. *Id.*

³ *Aspinwall v. Ohio & Miss. R.R. Co.*, 20 Ind. 492. As to the power of validating such acts by subsequent meetings of the corporation in the State of its creation, see *Freeman v. Machias Water Power & Mill Co.*, 38 Me. 343.

⁴ *Danforth v. Penny*, 3 Metc. 564. When a foreign corporation carries on business in a State, has its general office and books there as well as its property, and its election of directors is held there, it will be deemed a domestic corporation, and the stock owned by a non-resident stockholder may be attached in the State where it carries on its business. *Young v. South Tredegar Iron Co.*, 2 *Southwestern Reporter*, 202.

courts of each government from which it derives its being, that is, a domestic legal entity to the extent of the government under which it acts, and as a foreign corporation as regards the other sources of its existence.¹ Where a railroad company chartered in Connecticut, obtained permission to continue its line into and transact business in New York, it was held that it must be deemed as to its contracts made in New York, to possess the powers and subject to all the liabilities of similar corporations created in the latter State; and that it could not create a contract valid in New York, and then, when its interests dictated, set up the decisions of the courts of Connecticut as an excuse for its violation.² A corporation may engage in transactions beyond the State creating it, unless restrained by its charter, or by the laws of the State in which it attempts to act.³ In an early case in the Supreme Court of the United States, the court said: "We think it well settled that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and

¹ *State v. Northern Cent. R.R. Co.*, 18 Md. 193. Four persons entered into a contract for the purpose of quarrying stone in New Jersey, undertook to form themselves into a corporation under the laws of New York, and took all the steps required to effect their object by the New York law. It was held that their attempted organization as a corporation in New York was a fraud upon the law of New Jersey, and that they must be treated as partners trading under the name they had assumed. *Hill v. Beach*, 12 N. J. Eq. (1 Beas. Ch.) 31. Where a railroad corporation was authorized by its charter to sell its road, charter, franchises, and privileges to any person or corporation within or without the State, and such a purchase was made by a foreign railroad corporation, which assumed all the debts or obligations of the vendor,

the two companies becoming merged and consolidated under the name of the foreign corporation, it was held that the purchaser became a domestic corporation occupying the place of the vendor. *Angier v. East Tenn., etc., R.R. Co.*, 74 Ga. 634.

² *Milnor v. N. Y. & N. H. R.R. Co.*, 53 N. Y. 363.

³ *New York Floating Derrick Co. v. N. J. Oil Co.*, 3 Duer, 648; *Merrick v. Van Santvoord*, 34 N. Y. 208; *Dodge v. Council Bluffs*, 57 Iowa, 560; *Wood Hydraulic Hose Co. v. King*, 45 Ga. 34; *Kerchner v. Gettys*, 18 S. C. 521; *Balt., etc., R.R. Co. v. Glenn*, 28 Md. 287; *Williams v. Creswell*, 51 Miss. 817; *Newburg Petroleum Co. v. Weare*, 27 Ohio St. 343; *Plimpton v. Bigelow*, 93 N. Y. 592; *Cowell v. Springs Co.*, 100 U. S. 55.

sue in its courts; and that the same law of comity prevails among the several sovereignties of the Union. The public and well-known and long-continued usages of trade; the general acquiescence of the States; the particular legislation of some of them, as well as the legislation of Congress, all concur in proving the truth of this proposition."¹ Similar views were expressed by the same court in a more recent case.² But a corporation cannot lawfully do in another State what it is not authorized by its charter to do at home;³ and its acts must be in subordination to the law and public policy of the State where they are performed. Even in the case of private trading and eleemosynary corporations, if they would exercise the powers with which they are endowed in another State, it must be with reference and subject to the restrictions imposed by the laws of such State.⁴

¹ *Bank of Augusta v. Earle*, 13 Pet. 519.

² *Christian Union v. Yount*, 101 U. S. 352. In this case, HARLAN, J., said: "In harmony with the general law of comity obtaining among the States composing the Union, the presumption should be indulged that the corporation of one State, not forbidden by the law of its being, may exercise within any other State the general powers conferred by its own charter, unless it is prohibited from so doing either in the direct enactments of the latter State, or by its public policy to be deduced from the general course of its legislation, or from the settled adjudications of its highest court."

³ *Bard v. Poole*, 12 N. Y. 495; *Hoyt v. Sheldon*, 3 Bosw. 267; *Com. Union Ass. Co. v. Scammon*, 102 Ill. 46. See *Relfe v. Rundle*, 103 U. S. 222; *Thompson v. Waters*, 25 Mich. 214. Comity would perhaps allow a foreign corporation to do in another State what it was incapable of doing at home, if necessary to the legitimate exercise of

its functions. The States of New York and California might, for instance, through comity, allow a Pennsylvania corporation to hold, occupy, and operate vineyards in their respective States, for the purpose of furnishing grapes and wine to the people of Pennsylvania, the soil and climate of which are not adapted to such productions. But "no rule of comity will allow one State to spawn corporations, and send them forth into other States to be nurtured and to do business there, when said first-mentioned State will not allow them to do business within its own boundaries." *Land Grant R.R. v. Commrs. of Coffey County*, 6 Kans. 245, per VALENTINE, J.

⁴ *Mathews v. Trustees*, 2 Brewst. 541; *Metropolitan Bank v. Godfrey*, 23 Ill. 579; *Hitchcock v. U. S. Bank*, 7 Ala. 386; *Ohio Life Ins. & Trust Co. v. Merchants' Ins. & Trust Co.*, 11 Humph. 1. See *U. S. v. Fox*, 94 U. S. 315; *People v. Howard*, 50 Mich. 239; *White v. Howard*, 46 N. Y. 144; *U. S. Mortgage Co. v. Gross*, 93 Ill. 483.

It is the understanding of all civilized communities that in the silence of any positive rule of law affirming, denying, or restraining the operations of foreign laws, courts presume the tacit adoption of them by their own government unless repugnant to its policy or interest.¹ It should, however, be observed that the general laws of a State, designed to enforce a merely local policy, are not recognized by the law of comity in another State as to acts and contracts which, though not lawful in the former, are authorized in the latter; and the same rule applies to the provisions in the charter of a corporation which are not designed to operate extraterritorially. Thus, a promissory note given for a loan of money may stipulate for a rate of interest authorized by the law of the place where the note is made, although such a rate be disallowed in the place of payment.² The converse of this proposition is also true. If the interest allowed by the law of the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usury; provided the parties act in good faith, and the form of the transaction is not adopted to disguise its real character.³ In *Thompson v. Powells*,⁴ the Chancellor said: "In order to hold the contract usurious, it must appear that it was made here, and that the consideration for it was to be paid here. It should appear at least that the payment was not to be made abroad, for if it was to be made abroad, it would not be usurious. There is nothing to show that it was to be made here, and I cannot intend that it was to be made here, because that would be making an intendment merely to bring the case within the opera-

¹ Story Conflict of Laws, secs. 35, 37; domestic corporation. *Huss v. Centr. Williams v. Caswell*, 51 Miss. 817. R.R. & Banking Co., 66 Ala. 472.

Where a foreign corporation has a known place of business and an agent within the State, the statute of limitations is as available to it as if it were a
² *Depau v. Humphreys*, 8 Martin, N. S. La. 1.

³ *Miller v. Tiffany*, 1 Wall. 298.

⁴ 2 Sim. 194; 2 Eng. Ch. 386.

tion of a penal statute." Where certain promissory notes, bearing twelve per cent. interest per annum, were dated "Matagorda, Texas," the residence of the maker, but executed and delivered in New York, it was held that it was to be presumed, from the fact that the notes were not repugnant to the laws of Texas, whilst they would have been to the laws of New York, the parties intended that they should be paid in accordance with the laws of the former State.¹

The national banks organized under the act of Congress of 1864 are instruments designed to be used to aid the government in the administration of an important branch of the public service, and the States can exercise no control over them, nor in anywise affect their operation, except in so far as Congress may permit.² The act of Congress of July 24, 1866, substantially declares that the erection of telegraph lines shall, so far as State interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded by another State from

¹ Bullard v. Thompson, 35 Texas, 173; Nat. Bank v. Mathews, 98 U. S. 313. Where a company incorporated in Maryland, in which the rate of interest was six per cent. per annum, was forbidden by its charter to make any contract which by the existing laws constituted usury, borrowed money in New York to be repaid in that State, and agreed to pay interest thereon at the rate of seven per cent. per annum, which was at that time the lawful rate in New York, it was held that the contract was valid, the *lex loci contractus* furnishing the rule by which the validity of the contract was to be determined. 12 N. Y. (2 Kern.) 495. See Knox v. Bank of U. S., 26 Miss. 655; Farmers', etc., Bank v. Harrison, 57 Mo. 503; Perkins v. Watson, 2 Baxter, Tenn.

621.
² Farmers', etc., Nat. Bank v. Dearing, 91 U. S. (1 Otto) 29. A bank organized and existing by virtue of the national banking act, is a foreign corporation within the statute of New York, requiring the filing of security for costs. Nat. Park Bank v. Gunst, 1 Abb. N.C. 292; Merchants' Nat. Bank v. McNaughton, 1b. 293; and it is liable to attachment within the provisions of the code, for though formed under a law enacted by the government, it is still no part of the State government so called. Bowen v. First Nat. Bank of Medina, 34 How. Pr. 408. See First Nat. Bank of Whitehall v. Lamb, 57 Barb. 429.

prosecuting their business within its jurisdiction, if they accept the terms proposed by the government for this purpose.¹

The provision of the Constitution of the United States, however, that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States," does not apply to corporations;² and therefore any State may interdict foreign corporations from performing certain acts, or conducting certain kinds of business within its jurisdiction.³ But in the absence of interdiction, or in relation to transactions not embraced in the prohibition, and not contrary to the policy of the State, a corporation may transact business in another State than that of its creation, and enforce contracts in the courts of such other State, provided the contracts would be valid if made at the same place by an individual not a resident of the State.⁴ The right of a corporation to purchase and sell

¹ *Pensacola Tel. Co. v. Western Union Tel. Co.*, 6 Otto (96 U. S.) 1; *Am. Union Tel. Co. v. Western Union Tel. Co.*, 67 Ala. 26.

² *Warren Manf. Co. v. Etna Ins. Co.*, 2 Paine C. C. 501. If it did, the several States would be deprived of the right to regulate their internal affairs according to their interests and ideas of State policy.

³ Unless a case should be presented in which the rights claimed by the corporation should appear to be secured by the Constitution of the United States. *Runyan v. Coster*, 14 Pet. 122.

⁴ *Bank of Augusta v. Earle*, 13 Pet. 519; *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *Mumford v. Am. Life Ins. Co.*, 4 Comst. 463; *Bard v. Poole*, 12 N. Y. 495; *Curtis v. McCullough*, 3 Nev. 202; *Com. v. Milton*, 12 B. Mon. 212; *Phoenix Ins. Co. v. Com.*, 5 Bush. 68; *Gill v. Ky., etc., Mining Co.*, 7 Id. 635; *Martin v. Mobile & Ohio R.R. Co.*, *Ib.* 116; *Rees v. Conococheague*

Bank, 5 Rand. 326; *Myers v. Manhattan Bank*, 20 Ohio, 283; *Carroll v. East St. Louis*, 67 Ill. 568; *Stevens v. Pratt*, 101 Id. 206; *Pensacola Tel. Co. v. Western Union Tel. Co.*, *supra*; *Cowell v. Springs Co.*, 100 U. S. 55; *Christian Union v. Yount*, 101 Id. 352; *Weymouth v. Washington, etc., R.R. Co.*, 1 McArthur, 19; *Farmers' & Merchants' Ins. Co. v. Harrah*, 47 Ind. 236; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521; *Am. Mu. Life Ins. Co. v. Owen*, 15 Gray, 49. It is common for incorporated banks, insurance companies, and other associations, by their agents, to do business in other States than those of their domicile, in making investments in bonds, notes, and mortgages, issuing policies, and buying and selling exchange. See *Williams v. Creswell*, 51 Miss. 817. As the legislature of a State has no power to authorize a corporation to build a portion of its bridge outside the limits of the State, a promise of a person who passes

property not being in its nature strictly a franchise, but a right existing equally in individuals without special grant, is very generally recognized in States other than that of its creation.¹ If the policy of the State does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way. It cannot be inferred from the fact that its legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only under general laws.² As the charter of a foreign corporation is its warrant or authority from the State where it is created, the citizens of another State

over that portion to pay toll therefor will not be implied. *Middle Bridge Corp. v. Marks*, 26 Me. 326. The courts of a State will not administer a foreign charity. But they will direct money devoted to it to be paid over to the proper parties, leaving it to the courts of the State within which the charity is to be established to provide for its due administration, and for the proper application of the legacy. *Hill on Trustees*, 468; *Murbank v. Whitney*, 24 Pick. 154. The court of a State has not power to remove or appoint the trustees or directors of a foreign corporation; but it can enjoin their action when illegal, or when acting fraudulently or unlawfully, if they are personally within its jurisdiction. *Fisk v. Rock Island & Pacific R.R. Co.*, 53 Barb. 513. Although a court of equity will act upon the person of a defendant within its jurisdiction and compel specific performance of a contract in relation to land in a foreign State, yet it will not compel by its decree a defendant to go into a foreign State and specifically execute a contract there, even in the case of a natural person; and more especially not, when the defendant is an artificial person having no

legal existence beyond the territorial limits of the State which created it. *Port Royal R.R. Co. v. Hammond*, 58 Ga. 523; *Watts v. Waddle*, 6 Pet. 389.

¹ *Thompson v. Waters*, 25 Mich. 214. The objection to allowing a corporation in the State of its creation to hold land not occupied and used, or necessary to the exercise of its franchises, as prejudicial to the public interests, does not apply where land held in another State was taken for debts accruing in the course of its business. *Ibid.* Where foreign corporations are not permitted to hold land in the State beyond what is reasonably necessary for the transaction of their business, conveyances of real estate to a foreign corporation created for the purpose of buying and selling land, are of course void. *Carroll v. East St. Louis*, 67 Ill. 568; *U. S. Trust Co. v. Lee*, 73 Id. 142. If a statute of a State confers power upon a foreign corporation to take land by devise, it will be effectual to enable it to take in the State passing the statute, although not permitted to take land by devise in the State of its creation. *White v. Howard*, 46 N. Y. 144.

² *Cowell v. Springs Co.*, 100 U. S. 55; *Stevens v. Pratt*, 100 Ill. 206.

in which it carries on business are not bound to inquire into the general laws of the foreign State to see whether restrictions exist limiting the authority contained in the charter; general laws falling within the rule that where knowledge of a foreign law by a party is material upon a question of good faith, such knowledge must be brought home to him.¹ Allusion has already been made to the power of a State to exclude foreign corporations therefrom, and to invalidate all their acts done within its limits, if it sees fit to do so; for to recognize the right of a corporation created by one State to force its presence and business into the territory of another, would be to allow a State to give its laws an extraterritorial operation.² It follows that the consent of a State, express or implied, to the transaction of business therein by a foreign corporation, may be accompanied by such conditions as the legislature may see fit to impose, provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with the rules of public law, or the principles of natural justice; and power to revoke a permission is a necessary consequence of the main power.³ In such case, the condition is a part of every con-

¹ *Hoyt v. Sheldon*, 3 Bosw. 267; *Hoyt v. Thompson*, 19 N. Y. 207; S. C. 5 Id. 320.

² See *Com. v. Milton*, 12 B. Mon. 68; *Phoenix Ins. Co. v. Com.*, 5 Bush. Ky. 68; *Bank of Marietta v. Pindall*, 2 Rand. 465; *Home Ins. Co. v. Davis*, 29 Mich. 238; *Slaughter v. Com.*, 13 Gratt. 767.

³ *Lafayette Ins. Co. v. French*, 18 How. 404; *Doyle v. Continental Ins. Co.*, 94 U. S. (4 Otto) 535; *Lamb v. Bowser*, 7 Biss. 315. In *State v. Lathrop*, 10 La. An. 398, the court said: "If this State has thought fit to recognize foreign charters of incorporation to the extent of permitting foreign corporations to transact business in their corporate name through agents within our

limits, the legislature had an undoubted right to attach what conditions it thought fit to the privilege. It is a mere confusion of ideas to put those foreign corporations on the same footing with corporations which are the creatures of our own State laws, from the simple fact of their being alike corporations. It is equally unsound to claim for them the personal and constitutional rights of the citizens of the several States." *Paul v. Virginia*, 8 Wall. 168, arose upon a statute of Virginia, which provided that no foreign insurance company should transact business in that State until it had taken out a license, and made a deposit with the State treasurer of bonds varying in amount from \$30,000 to \$50,000, ac-

tract made in the State.¹ A statute of Wisconsin having declared that if a foreign insurance company should remove any case from its State court into the Federal courts, contrary to the provisions of a certain statute, it should be the duty of the secretary of state immediately to cancel its license to do business within the State, it was held that no right under the laws or Constitution of the United States was thereby infringed; a license to a foreign corporation to enter a State not involving a permanent right to remain, but the State having authority at any time to declare that it should no longer transact business there.² The power of

cording to the amount of its capital. It was held that the legislature had a right to impose such conditions, and the judgment of the State court convicting Paul upon an indictment for violating the State law in issuing policies without first complying with the required conditions, was sustained. A similar decision was rendered, in *Ducat v. Chicago*, 10 Wall. 410, with reference to a statute of Illinois. "An insurance company, in doing its business in another State, owing to the nature of the business itself (making contracts of insurance), would seem to be exercising through agents its corporate franchises in the same way as in the State of its creation, with the exception of corporation meetings, and the strictly official action of its officers; and for this, as well as the prudential reason of protecting their citizens from imposition, and perhaps encouraging home companies, other States have quite generally required their compliance with certain rules and regulations fixed by the legislatures, as conditions upon which alone they are allowed to do their business within such State." *Thompson v. Waters*, 25 Mich. 214. In *Oregon and Illinois*, contracts entered into by foreign corporations in disregard of the conditions imposed by statute, are

deemed void. *In re Comstock*, 3 Sawyer, 218; *Oregon Investment Co. v. Rathbone*, 10 Chicago Legal News, 58; *Cincinnati Mu. Co. v. Rosenthal*, 55 Ill. 85. The act of Colorado does not go so far, but merely enjoins a duty, and punishes disobedience to its command, not by avoiding the contracts of the corporation, but by holding its officers, agents, and stockholders liable for such contracts. *Northwestern Mu. Life Ins. Co. v. Overholt*, 4 Dillon, 287. Under the act of Montana, requiring foreign corporations doing business in the territory to file its charter or act of incorporation, it is wilful negligence on the part of the corporation to fail to do so, and relieves a person suing the corporation from proving the act of incorporation. *King v. National, etc., Co.*, 4 Montana, 1.

¹ *Glens Falls Ins. Co. v. Judge of Jackson Ct.*, 21 Mich. 579.

² *Doyle v. Continental Ins. Co.*, 4 Otto, 535. BRADLEY, J., dissenting, said: "Though a State may have power, if it sees fit, to subject its citizens to the inconvenience of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so. Total prohibition may produce suffer-

a State to discriminate between its own domestic corporations and those of other States desirous of transacting business within its jurisdiction, is clearly established.¹ In New Jersey, an act relative to insurance companies was held constitutional which prescribed, in substance, that no person should act as an agent for any individuals or association of individuals resident out of the State, and not incorporated by some local law of it, until he had given a bond to the collector of the county within which he might reside that, among other things, he would pay a tax upon the premiums he received; no such tax being imposed by law upon insurance companies of the State.² But it would not be competent for a State legislature to impose a tax upon the receipts of a foreign corporation for the transportation of merchandise received and delivered out of the State, and simply carried through the State, as that would be a tax upon interstate commerce.³ In *Erie R.R. Co. v. State*,⁴ most of the merchandise and passengers for the transportation of which by the Erie Railroad Com-

ing, and may manifest a spirit of unfriendliness toward sister States; but prohibition, except upon conditions derogatory to the jurisdiction and sovereignty of the United States, is mischievous, and productive of disloyalty to the general government. If a State is unwise enough to legislate the one, it has no constitutional power to legislate the other. The citizens of the United States, whether an individual or associations corporate or incorporate, have a constitutional right, in proper cases, to resort to the courts of the United States. Any agreement, stipulation, or State law precluding them from this right, is absolutely void—just as void as would be an agreement not to resort to the State courts for redress of wrongs, or defense of unjust actions, or, as would be a city

ordinance prohibiting an appeal to the State courts from municipal prosecutions.”

¹ *Paul v. Virginia*, 8 Wall. 168; *Ducat v. Chicago*, 10 Id. 410; *Fire Dept. v. Noble*, 3 E. D. Smith, 440; *State v. Fosdick*, 21 La. Ann. 434; *Glazie v. So. Car. R.R. Co.*, 1 Strobb. 70; *Cowardin v. Universal Life Ins. Co.*, 32 Gratt. 445. See *Wood Mowing Machine Co. v. Caldwell*, 54 Ind. 279; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 539; *People v. Fire Association*, 92 N. Y. 311; *Home Ins. Co. v. Davis*, 29 Mich. 238; *Hagerman v. Empire State Co.*, 97 Pa. St. 534; *Semple v. Bank of British Columbia*, 5 Sawyer, 88.

² *Tatem v. Wright*, 3 Zab. 429.

³ *State v. Am. Express Co.*, 7 Biss. 227.

⁴ 31 N. J. (2 Vroom) 531.

pany, in the State of New Jersey, a transit duty or tax was charged, had been by that company, and other railroads in connection with them, carried over the State of New Jersey from States and Territories of the United States in the West, to States of the United States in the East, and from States of the United States in the East, over New Jersey, to States and Territories of the United States in the West. The court, in holding that the legislature of the State had not the constitutional power to lay the tax in question, said: "Considering the question in a theoretical point of view, it would seem to be clear that a State cannot tax for the purpose of revenue a foreign corporation in a mode different in principle from that in which she can tax one of her own domestic corporations. It is not denied that the corporate existence of a company is recognized, not by right, but of grace, in foreign jurisdictions, nor that each government has the competence to refuse to recognize such existence except on its own conditions. The principle is universally acknowledged. Hence laws requiring insurance companies and other foreign corporations to file bonds, and submit to other exactions, as a prerequisite to their admission in an incorporated capacity into the State. Such laws, when rightfully made, are evidently mere police regulations, designed to protect the citizens of the State in which they are enacted from loss or imposition, and on this ground their legality cannot be drawn in question. But a tax law having revenue for its object is based upon a principle entirely different. The right to tax for revenue is the right of the government to take so much of the property of the person or company upon whom the tax falls as such government may deem necessary for its public wants. The act of taking the property, therefore, must of necessity be an acknowledgment of the legal status of the person or company whose property is taken. To assert that the company whose property is thus taken has no rights but such

as the government chooses to confer, is to assert that such company has no title to its property but such as may be conceded to it by the taxing power. It seems to be utterly inconsistent with legal principles, which have always been deemed axiomatic, to hold that a government can recognize the legal existence of a foreign corporation for the purpose of taxation, and at the same time can deny such legal existence for the purpose of depriving it of those rights which belong to every individual or company known to the law. Such a doctrine would obviously offer the entire property of foreign corporations as a prize to the rapacity of any State in whose territory it might be, or over which it might happen to be carried."

It is not an objection that a foreign corporation, after due organization at home, commenced its foreign business first;¹ nor that such business was authorized at a meeting of directors held away from its domicile.² A corporation kept an office and held its annual meetings in the State creating it; but most if not all of the business meetings of the directors were held in another State, the organizers of the corporation being disqualified by the laws of the latter State from conducting it, and it was incorporated in the first-mentioned State for that reason. It was held that the courts of the last-mentioned State would recognize it as a corporation of the State which chartered it.³

§ 151. **Amalgamation.**—This term, as applied to corporations, though not usually employed in this country, is used in England where two companies, having agreed to abandon their respective articles of association, and to register themselves under new articles as one body, a new company is formed by their coalition.⁴ The word "amalgamate" is

¹ *Hanna v. International Petroleum Co.*, 23 Ohio St. 622; *Newburg Petroleum Co. v. Weare*, 27 Id. 343.

² *Smith v. Alvord*, 63 Barb. 415.

³ *Second Nat. Bank of Cincinnati v. Lovell*, 2 Cin. 397.

⁴ *In re Bank of Hindustan*, 2 H. & M. 666.

sometimes made to signify various operations in themselves widely different, which more or less completely work a transfer of corporate affairs from one corporation to another, and a merger of the former body in the latter.¹ The operation when fully carried out involves: 1st. A destruction of the entity of the original corporations; 2d. A transfer of corporate rights and liabilities; 3d. A transmutation of the members of the former corporation into members of the latter; a novation of the rights of creditors of the corporation which is merged in the other, so that the latter corporation is substituted as debtor.² Where the proceedings aim at a transfer of franchise, or special privileges, they cannot be carried out without express legislative sanction.³ It is doubtful whether shareholders can, by any provision in the constating instruments, against their wish be made members of another corporation;⁴ but it may be done with the assent or acquiescence of all of the members whenever there is power to that effect, express or implied.⁵ When the constating instruments expressly provide for amalgamation, the provisions must be strictly followed, as otherwise any member may refuse his assent.⁶ In case a corporation is not able directly to merge itself with another, the method adopted for accomplishing substantially the same thing, is by transferring its property, funds, rights,

¹ Green's Brice's Ultra Vires, 2d Am. Ed. 606.

² Ibid.

³ Northern R.R. Co. v. Eastern Counties R.R. Co., 21 L. J. 837; Winch v. Birkenhead, etc., R.R. Co., 7 Rail. Cas. 334; Beman & Rufford, 1 Sim. N. S. 550; London & Southwestern R.R. Co. v. Southeastern R.R. Co., 8 Ex. 584; West London R.R. Co. v. London & Northwestern R.R. Co., 11 C.B. 327; London, Brighton, etc., R.R. Co. v. London & Southwestern R.R. Co., 28 L. J. Ch. 521. See Johnson v. Shrewsbury, etc., R.R. Co., 3 De G.

M. & G. 914; Rhymney R.R. Co. v. Taff Vale R.R. Co., 30 L. J. Ch. 482.

⁴ Bagshaw, *ex parte*, L. R. 4, Eq. 341; Clinch v. Financial Corp., L. R. 4, Ch. 117; Bank of Hindustan v. Alison, L. R. 6, C. P. 54, 222; *In re* London & Northern Ins. Corp., L. R. 4, Ch. 682.

⁵ Hort's Case, 1 Ch. D. 307; Harman's Case, *ib.* 326; Cocker's Case, 3 Id. 1; Rivington's Case, *ib.* 10; Dooman's Case, *ib.* 21.

⁶ Bagshaw, *ex parte*, *supra*; *In re* Irrigation Co. of France, L. R. 6, Ch. 176.

and liabilities to the other contracting corporation, and then voluntarily dissolving itself, which, although not a union of one corporation with another, is a sufficient amalgamation for all practical purposes.¹ "Arrangements of this kind being in substance arrangements for winding up or otherwise dissolving some one or more of the companies participating therein, are manifestly matters of internal government only. Consequently their validity, and the extent and circumstances to and under which they are binding upon recalcitrant members, will be determined by the constating instruments. Probably, in every case, express powers in this behalf are necessary in order that a corporation may itself enter into such arrangements, and, *a fortiori*, in order to bind dissentients."² A corporation may amalgamate so as to transfer its assets without the consent of its creditors. But a new corporation cannot be substituted as debtor against the will of a creditor. There must be an agreement, express or implied, by which the creditor gives up his rights against his debtor, and accepts instead the responsibility of the new debtor.³

§ 152. **Meaning of consolidation.**—Although it is difficult to give a precise and comprehensive definition of this term, yet it may be stated generally that by it is intended the formation of a corporate body out of two or more corporations, or the union of the members of several similarly constituted companies in a single company, and an incorporation of the latter with the combined capital, rights, privileges, and franchises of all of them. It has been said to be a dissolution of certain corporations, and at the same instant the creation of a new corporation, with property, liabilities, and stockholders derived from those passing out of

¹ *In re United Ports & Genl. Ins. Co.*, L. R. 8, Ch. 1002; *Perrett's Case*, L. R. 15, Eq. 250.

² *Green's Brice's Ultra Vires*, 2 Am. Ed. 614.

³ *In re Manchester, etc., Loan Assoc.*, L. R. 9, Eq. 643; *In re Family Endowment Assoc.*, L. R. 5, Ch. 118; *In re National Provident Life Ass. Co.*, L. R. 9, Eq. 306.

existence.¹ "A surrender of the old charter by the companies, the acceptance thereof by the legislature, and the formation of a new company out of such portions of the old as enter into the new."² The foregoing would not, however, be applicable to all cases. Where several railroad companies were "merged in and constituted one body corporate" under the name of one of them, and all were continued in existence, the court treated it as a consolidation.³ A new corporation may be as readily created by the union of two or more corporations as by the union of individuals, and its powers and privileges may as well be designated by reference to the charters of other companies, as by special enumeration. The fact that the powers, privileges, and immunities possessed by the original corporations are conferred upon the new one, so far as they can be exercised and enjoyed by it, will not affect its character as a distinct body.⁴ Where a railroad company was authorized by an act of the legislature to transfer and assign, by a vote of a majority in interest of the stockholders, all its effects and assets, rights and privileges, and all the work done in the construction of the road, to the North Missouri Railroad Company, and, upon such transfer and acceptance, the company was "to cease to have corporate

¹ McMahan v. Morrison, 16 Ind. 172.

² Lauman v. Lebanon Valley R.R. Co., 30 Pa. St. 42; State v. Bailey, 16 Ind. 46. "Consolidation would be inapplicable to a union of two or more companies in such a way that one of the original corporations only was continued in existence, while the others were merged or absorbed in it. An absorption of one corporation by another would, according to some of the decisions, be an amalgamation in England; but it would not be consolidation here." Green's Brice's *Ultra Vires*, 2d Am. Ed. 631, note.

³ Phila., Wilm. & Balt. R.R. Co. v.

Howard, 13 How. 307. Strictly speaking, a merger of one corporation into another, "is a dissolution, destroying the actual identity of both, while the legal identity of one of them is preserved. As where a life estate is merged in a fee simple, one being destroyed and the other enlarged by the operation." LOWRIE, C. J., in *Lauman v. Lebanon Valley R.R. Co.*, 30 Pa. St. 42.

⁴ Railroad Co. v. Maine, 96 U. S. 499. See *New Orleans, etc., Co. v. Louisiana, etc., Co.*, 11 Fed. Rep. 277; *Compagnie Francaise, etc., v. Western Union Tel. Co.*, *Ib.* 842.

existence," and the road was to be thenceforth styled the "West Branch of the North Missouri Railroad," the franchises becoming completely vested in the North Missouri Railroad Company; but the accounts and business of the West Branch were required to be kept separate and distinct from the main line, so that one road should not be liable for the debts of the other, it was held not a mere amalgamation or consolidation of the two corporations into one, but the first corporation was extinguished, and the second one only continued to exist.¹

Whether the consolidation works a dissolution of the former corporations in a given case, will of course depend upon the legislative intent manifested in the act under which the consolidation takes place. It was held in a case in the Supreme Court of the United States that the two companies there mentioned were not dissolved by their consolidation; that the consolidated companies continued to possess all the rights and immunities which were conferred upon each company by its original charter; and that, as one of the companies was exempt from liability to any greater tax than one-half of one per cent. of its net annual income, the exemption continued after its consolidation. STRONG, J., said: "If in the statute there be no words of grant of corporate powers, it is difficult to see how a new corporation is created. If it is, it must be by implication, and it is an unbending rule that a grant of corporate existence is never implied. In the construction of a statute every presumption is against it. True, it is where three corporations had consolidated under an act of the legislature authorizing them to merge and consolidate their stock and make one joint company, it was said that

¹ Powell v. North Mo. R.R. Co., 42 Mo. 63. See Gilman v. Sheboygan, etc., R.R. Co., 37 Wis. 317; Menasha v. Milwaukee, etc., R.R. Co., 52 Id. 414; Campbell v. Marietta, etc., R.R. Co., 23 Ohio St. 168; Cook v. Detroit, etc., R.R. Co., 43 Mich. 349; Daniels v. St. Louis, etc., R.R. Co., 62 Mo. 43; Western R.R. Co. v. Davis, 66 Ala. 578.

the effect of the act, and the terms of consolidation under it, was a dissolution of the three corporations and at the same instant the creation of a new corporation, with property, liabilities, and stockholders, derived from those then passing out of existence. And this language was quoted approvingly by this court. But in neither case was an assertion of this doctrine necessary to the decision made. And indeed we find no case decided in this country where the question directly arose or was necessarily determined. There are numerous cases where a consolidated company has been held liable for the debts of the old companies, and where it has been held to possess the rights of the old companies; but this does not necessarily imply a surrender of all the old charters. So there are cases where it has been held that a consolidation cannot be consummated against the consent of a stockholder in one of the companies unless his stock is purchased. This, however, may be doubted as applicable to all companies; but, if universally true, it leaves open the question whether the consolidation is the creation of a new company. We are not called upon, however, now to determine whether a consolidation effected under a statute making no express grant of a new corporate existence, may not in some cases work a dissolution of the existing corporations, and at the same time the creation of a new company. . . . It is true the act speaks of union and consolidation. It authorizes the two companies to unite and consolidate their stock and all their rights, privileges, immunities, property, and franchises; but it prescribes the manner in which this may be done, and its effect. It is to be done under the name and charter of the Central Railroad and Banking Company; that is, the union is to be under that charter, not under a new charter of a company bearing that name.”¹ An act

¹ Central R.R. & Banking Co. v. Morrison, 16 Ind. 172, and Clear-Gorgia, 92 U. S. 665, reversing S. C. water v. Meredith, 1 Wall. 40. 54 Ga. 401, and referring to McMahan

of Ohio authorized railroad companies to consolidate with similar companies of other States, and provided that such consolidated companies respectively should be deemed one corporation, possessing within the State all the rights, privileges, and franchises, and be subject to all the restrictions, liabilities, and duties of corporations of the State; that the old stock should be extinguished, a board of directors of the consolidated company be elected, and a new stock be created and issued to the parties entitled to it, and that those refusing to receive the new stock should be paid the highest market price for their old stock. It was held that when the consolidation was completed, the old companies were destroyed, a new one created, and powers granted it in all respects as if the old companies had never existed.¹ In 1863 an act was passed by the legislature of Georgia empowering two railroad companies of the State to consolidate their stocks upon such terms as might be agreed upon by the directors, and be ratified by a majority of the stockholders, and that when so consolidated, they should be known as the Atlantic and Gulf Railroad Company. It was held that the intention of the legislature was the creation of a new corporation, and not a mere alliance or confederation of the two previously existing companies.²

¹ *Shields v. Ohio*, 95 U. S. 319, *affi'g* s. c. 26 Ohio St. 86.

² *Railroad Co. v. Georgia*, 98 U. S. 359. The act of New Jersey of 1870, providing that it should be lawful for the united railroad and canal companies of that State, "by and with the consent of two-thirds of the stockholders of each, to consolidate their respective capital stocks; or to consolidate with any other railroad or canal company or companies in this State or otherwise, with which they are or may be identified in interest, or whose works shall form, with their own,

connected or continuous lines; or to make such other arrangements or connection or consolidation of business with any such company or companies by agreement, contract, lease, or otherwise, as to the directors of said united companies shall seem expedient"; and further providing that "any stockholder who should be dissatisfied with such arrangement and should give notice of his dissatisfaction within three months after it was made, should be paid the full value of his stock to be approved of by commissioners appointed for the purpose," gave the united companies

§ 153. **Power to consolidate.**—A consideration of this subject is to be regarded in two aspects, both of which involve questions of contract: 1st, as between the State and the corporations desiring to become consolidated; and 2d, as between the corporations and their members. Since corporations derive not only their existence, but all of their powers from the legislature, it is obvious that a change so fundamental as a union of several corporations under one head, constituting a body with new relations, rights, and duties, cannot be made from any implied authority, but only by the express sanction of law;¹ and that the provisions of the act authorizing the consolidation must be carefully observed in respect to the steps required to be taken for the accomplishment of the result.² Where a statute gives a corporation power to form a consolidation with any other, whatever other corporation it selects for a union, and finds willing to join it, may unite with it although not named in the statute.³ The consolidation may be authorized either by the charters of the corporations, by general laws, by an act passed subsequent to the incorporation of the several companies, or by legislative recognition

power without the consent of all of the stockholders to sell, lease, or otherwise dispose of their works, or to abandon them. *Black v. Del. & Raritan Canal Co.*, 22 N. J. Eq. (7 C. E. Green) 130. ZABRISKIE, Chancellor, said: "There is no case that holds that a majority of corporators, where a time is not specified for which the enterprise must be continued, may not abandon the enterprise and sell out the property of the company. The dictum of Parker, Master, in *Kean v. Johnston*, 1 Stockt. 413, is the only authority which I find in support of the doctrine. The dictum, in my own opinion, in *Zabriskie v. Hack. & N. Y. R.R. Co.*, 3 C. E. Green, 193, that a single stockholder can prevent all others from changing or aban-

doning the work, must be taken with the qualification annexed to it in the former part of the opinion, p. 183; that is, where they become members of a corporation for definite purposes specified in the charter, and for a time settled by it."

¹ *Pearce v. Madison, etc., R.R. Co.*, 21 How. 441; *Fisher v. Evansville, etc., R.R. Co.*, 7 Ind. 407; *Clearwater v. Meredith*, 1 Wall. 25; *Aspinwall v. Ohio & Miss. R.R. Co.*, 20 Ind. 492.

² *Mansfield, etc., R.R. Co. v. Drinker*, 30 Mich. 124; *Peninsular R.R. Co. v. Tharp*, 28 Id. 506; *Tuttle v. Mich. Air Line R.R. Co.*, 35 Id. 247.

³ *Matter of Prospect Park and Coney Island R.R. Co.*, 67 N. Y. 371.

and ratification of the proceeding.¹ In most of the States the consolidation of railroad companies owning continuous lines is provided for by general statutes. But the legislature itself cannot authorize a consolidation after the granting of charters, or the incorporation of the companies under general laws which are silent on the subject, except through the exercise of the right of eminent domain, without the consent of all of the members of the original corporations, since that would change the nature and purposes of their organization by the destruction of one private contract and the compulsory creation of another.² "A subscription is always presumed to have been in view of the main design of the corporation, and of the arrangements made for its accomplishment. A radical change in the organization or purposes of the company may, therefore, take away the motive which induced the subscription, as well as affect injuriously the consideration of the contract. For this reason, it is held that such a change exonerates a subscriber from liability for his subscription; or, if the contract has been executed, justifies a stockholder in resorting to a court of equity to restrain the company from applying the funds of the original organization to any project not contemplated by it."³ Again, it was said: "The proposition now considered is, whether, after shareholders have entered into a contract among themselves under legislative sanction, and expended their money in the execution of the plan mutually agreed upon, the scheme can be radically changed by the majority by virtue of a legislative enactment, and a

¹ Bishop v. Brainerd, 28 Conn. 289; Mead v. N. Y., Housatonic, etc., R.R. Co., 45 Id. 199; Mitchell v. Deeds, 49 Ill. 416; McAuley v. Columbus, etc., R.R. Co., 83 Id. 348. See New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650.

² Clearwater v. Meredith, *supra*; Kean v. Johnson, 9 N. J. Eq. (1

Stockt.) 401; Terhune v. Midland R.R. Co., 38 Id. 423; Mowry v. Ind. & Cin. R.R. Co., 4 Biss. 78; Lauman v. Lebanon Valley R.R. Co., 30 Pa. St. 46; New Orleans, etc., R.R. Co. v. Harris, 27 Miss. 517; Shelbyville, etc., Turnp. Co. v. Barnes, 42 Ind. 498.

³ Nugent v. Supervisors, 19 Wall. 241.

dissentient stockholder compelled to engage in a new and totally different undertaking, without impairing the obligation of his contract with his associates and with the State. That this cannot be done, is as well supported by every consideration of justice and right, as it is firmly imbedded in judicial decision.”¹ Where the charter provides for consolidation, or one of the purposes for which the company was incorporated was to consolidate, so that it must be presumed that subscribers might have reasonably anticipated such a result, or where, though the act for consolidation is passed after the corporation is created, it is previous to subscription, it cannot be said that any motive for the subscription has been taken away, or that the consideration for it has failed, and shareholders are precluded from objecting.²

If the language of the act authorizing the consolidation be general, without specifying the means or concurrence by which the result is to be obtained, it may be accomplished in the usual mode of corporate action, that is, by a vote of a majority of the members.³

§ 154. **Effect of consolidation in general.**—The most obvious effect of the change is the formation of a new corporate body composed of the elements of the old, and deriving its powers, rights, and privileges from the act which authorizes the consolidation. The franchises of the new body may be specified in the act, or, as is frequently the case, the act

¹ Black v. Del. & Rar. Canal Co., 24 N. J. Eq. (9 C. E. Green) 455.

² Nugent v. Supervisors, *supra*; Wilson v. Salamanca, 99 U. S. 499; Green County v. Conness, 109 Id. 104; Hanna v. Cincinnati, etc., R.R. Co., 20 Ind. 30; Gardner v. Hamilton Ins. Co., 33 N. Y. 421; Hamilton Ins. Co. v. Hobart, 2 Gray, 543; Fee v. New Orleans Gas Light Co., 35 La. Ann. 413. The articles of association of a company, which prohibited the consolidation of

the company with any other unless sanctioned by a majority of the stockholders, provided for an amendment of the articles by a vote of two-thirds of the executive committee and a majority of the trustees. It was held that the stockholders could not be deprived by an amendment of the right to pass upon the question of consolidation. Blatchford v. Ross, 54 Barb. 42.

³ Dimpfel v. Ohio & Miss. R.R. Co., 8 Reporter, 641.

may refer to the charters of the original corporations, and the consolidated company be clothed with their rights and privileges so far as may be necessary to carry out the purposes of the organization. The act of consolidation would be an act of incorporation within a provision of the constitution, or a general law by which the State reserved the right to amend or repeal all private charters thereafter granted.¹

As the consolidated body acquires its power by creation and grant, its nature and the extent of its authority, and whether the old companies lose their identity, or continue in existence, will depend, as already stated, of course upon the language and intent of the statute. Unless restricted by the law under which the consolidation takes place, the new corporation succeeds to and possesses the franchises, rights, privileges, and immunities of the several companies from which it is formed.² An act which provides that any two or more railroad companies in the State owning railroads constructed in whole or in part, which, when completed and connected, will form in the whole or in the main one continuous line of railroad, may consolidate and form one company, owning and controlling such continuous line of road with all the powers, rights, privileges, and immunities, and subject to all the obligations and liabilities to the State, or otherwise, which belonged to or rested upon either of the companies making such consolidation, contemplates the actual dissolution of the old corporations, and the creation of a new one to take their place.³

¹ *Aspinwall v. County of Daviess*, 22 How. 364; *Shields v. Ohio*, 95 U.S. 319; *Railroad Co. v. Maine*, 96 Id. 499; *Railroad Co. v. Georgia*, 98 Id. 359; *Atlanta, etc., R.R. Co. v. State*, 63 Ga. 483; *Powell v. North Mo. R.R. Co.*, 42 Mo. 63.

² *Zimmer v. State*, 30 Ark. 677; *Chicago, etc., R.R. Co. v. Moffit*, 75 Ill. 524. "The franchises of a railroad corporation are rights or privileges

which are essential to the operations of the corporation, and without which its roads and works would be of little value; such as the franchise to run cars, to take tolls, appropriate earth and gravel for the bed of its road, or water for its engines, and the like." *Morgan v. Louisiana*, 93 U. S. 217.

³ *Pullman Car Co. v. Missouri Pacific R.R. Co.*, 115 U. S. 587.

While the consolidated company may use and enjoy the property transferred to it substantially as it was used and enjoyed by the original companies, and must necessarily do so, yet a special privilege attached to the property of one of the companies would be confined to it, and could not be made to embrace the whole property. Several railroad companies forming a continuous line, chartered respectively by the States of Maryland, Delaware, and Pennsylvania, one of which was exempt from certain taxation, were consolidated; and it was claimed by the consolidated company that this exemption was transferred to it, and affected all parts of the line. The act authorizing the union of the several companies provided that the "said body corporate so formed shall be entitled to all the powers, privileges, and advantages then belonging to the former corporations." It was held that the exemption did not extend to a portion of the line to which it had not extended before the union; that the meaning of the law was that whatever privileges and advantages either of the former companies possessed, should in like manner be held and possessed by the new company to the extent of the road which the former companies had respectively occupied before the union; that it should stand in their place and possess the power, rights, and privileges they had severally enjoyed in the portions of the road which had previously belonged to them.¹ The legislature of Arkansas passed an act in 1853 to incorporate the Cairo and Fulton Railroad Company, with power to construct and operate a railroad from the Mississippi River to the Texas boundary line, near Fulton, in Arkansas. Section ten of the act provided that the company should have power to consolidate with

¹ Phila., Wilm. & Balt. R.R. Co. v. Maryland, 10 How. 376, approved and adopted in Tomlinson v. Branch, 15 Wall. 460, and Charleston v. Branch, Ib. 470, S. C. 92 U. S. 677. See Meade v. N. Y., Housatonic, etc., R.R. Co., 45 Conn. 197; South Carolina R.R. Co. v. Blake, 9 Rich. 233; Fisher v. N. Y. & Hudson River R.R. Co., 46 N. Y. 644; Zimmer v. State, 30 Ark. 680.

certain other companies, and section eleven declared that the capital stock and dividends of the company should be forever exempt from taxation, and the road, fixtures, and appurtenances be so exempt until after it paid an interest of not less than ten per cent. per annum. At the time of the passing of this act, the constitution of the State contained no restriction upon the power of the legislature to grant such an exemption from taxation; but the State constitution which took effect in 1868, and was in force until October, 1874, provided that all laws conferring corporate powers might from time to time be altered or repealed; that the general assembly should not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, should not equally belong to all citizens, and that the property of corporations then existing or afterward created should forever be subject to taxation the same as the property of individuals. An act was passed in July, 1868, empowering any railroad company then chartered under existing laws, or which might afterward become incorporated, to purchase and hold any connecting railroad, and operate the same, or to consolidate their companies; but that when such purchase was made, or consolidation effected, the said company should be entitled to all the benefits, rights, franchises, lands and tenements, and property of every description belonging to the road or roads so sold or consolidated, and should be liable to all the pains and penalties imposed by their respective charters. In May, 1874, the Cairo and Fulton Railroad Company was consolidated with the St. Louis and Iron Mountain Railroad Company, a corporation of Missouri, resulting in the formation of the St. Louis, Iron Mountain, and Southern Railroad Company. The consolidated company, claiming that it was entitled, under the charter of the Cairo and Fulton Railroad Company, to the exemption from taxation contained in it, filed a bill in equity against the railroad

commissioners of the State to restrain them from proceeding to assess for taxation the property of the company in Arkansas. The main point urged in argument in support of the claim to the exemption from taxation, was that the consolidation of the Cairo and Fulton Railroad Company with the St. Louis and Iron Mountain Railroad Company, was the exercise of a right, on the part of the former, plainly and expressly conferred by the tenth section of its charter, and not in anywise inconsistent with the continued force of the exemption contained in the eleventh section, which referred as well to the company when it had become a constituent of a consolidated company under the previous section, as to the same company, in its original form and organization. The Supreme Court of the United States, in affirming the judgment of the court below, dismissing the bill, said: "This new corporation did not come into existence until May 4, 1874. It came into existence as a corporation of the State of Arkansas, in pursuance of the constitution and laws, and subject in all respects to their restrictions and limitations. Among these was that one which declared that 'the property of corporations, now existing or hereafter created, shall forever be subject to taxation, the same as property of individuals.' This rendered it impossible in law for the consolidated corporation to receive, by transfer, from the Cairo and Fulton Railroad Company, or otherwise, the exemption sought to be enforced in this suit. It is not an answer to this conclusion to say that the act of consolidation having been made in pursuance of the tenth section of the charter of the Cairo and Fulton Railroad Company, was the exercise by that company of a right secured to it by contract which no subsequent constitution or law of the State of Arkansas could impair or defeat. For what was the contract? Construed in the most liberal spirit in favor of the company, it cannot be extended beyond a stipulation on the part of the State,

that the Cairo and Fulton Railroad Company may at any time thereafter, by consolidation with any other railroad company, form and become a new corporation, with such powers and privileges as at the time when the offer is accepted and acted upon it may be within the power of the State to confer, and lawful for the new corporation to accept. If acted upon before the law was changed, it might well be that all the powers and privileges originally conferred in the charter of the Cairo and Fulton Railroad Company, including the exemption in question, would have vested in the new company. But, as it was not accepted and acted upon until a change in the organic law of the State forbade the creation of corporations capable of holding property exempt from taxation, it must be presumed that when the original company entered into the consolidation, it did so in full view of the existing law, and with the intention of forming a new corporation, such as the constitution and laws at that time permitted.”¹

A power to subscribe to the stock of a corporation may be exercised in respect to the body formed by its subsequent union with other corporations. Thus where a county was authorized by law to subscribe for shares in a railroad company which was afterward consolidated with another company, it was held that the county was entitled to subscribe for shares in the consolidated company in place of

¹ St. Louis, etc., R.R. Co. v. Berry, 113 U. S. 465. See Louisville, etc., R.R. Co. v. Palmes, 109 U. S. 244; Memphis, etc., R.R. Co. v. R.R. Commrs., 112 Id. 609; Tennessee v. Whitworth, 117 Id. 129. An agreement made by one of several railroad companies before consolidation in reference to its road and to all roads which it then controlled or might thereafter control, does not affect roads not controlled by it at the time of the consolidation, but acquired by the new company after-

ward. Contracts thereafter made to get the control of other roads would be the contracts of the new consolidated company, and not of those on the dissolution of which that company came into existence. Pullman Car Co. v. Missouri Pacific R.R. Co., 115 U. S. 587. Where a railroad company, after giving promissory notes, is consolidated with another company under a new name, it may be sued by the new name. Columbus, etc., R.R. Co. v. Skidmore, 69 Ill. 566.

the subscription originally intended.¹ But this could only be done when the power clearly embraced the alternative, as the two cases might present wholly different considerations. Where, therefore, a county was authorized to subscribe to a corporation and issue bonds, if sanctioned by a vote of two-thirds of the voters, and after such vote consolidation was effected, it was held that bonds issued without a new vote were void.² Where, however, the legislature of a State by the same act which conferred power on a city to lend its credit to each of two railroad companies, also empowered them to consolidate their roads, it was held that the power of the city might be exercised after such consolidation as effectually as before, as otherwise there would have been some limitation of the power.³

§ 155. **Effect of consolidation in respect to creditors.**—Debts incurred by a corporation cannot be released or transferred by legislative enactment, as this would impair the obligation of contracts existing between individuals and the corporation.⁴ Where, therefore, it was agreed to loan

¹ Scotland v. Thomas, 94 U.S. 682.

² Harshman v. Bates Co., 92 U.S. 569. See Mansfield, etc., R.R. Co. v. Drinker, 30 Mich. 124. Where several railroad companies are consolidated, the corporation thus formed cannot declare a dividend of the earnings of one of the old companies made before the consolidation; or declare dividends of the earnings of the consolidated corporation on the stock of such old company. Chase v. Vanderbilt, 37 N.Y. Super. Ct. 334. Where each of two railroad companies had the right to use a patented axle-box, and they were afterward consolidated, it was held that the consolidated company was entitled to avail itself of the benefit of the invention. Lightner v. Boston & Albany R.R. Co., 1 Lowell, 338.

³ Robertson v. Rockford, 21 Ill. 451.

Where a railroad company is created with special powers, its deed of its property and franchises, though under the corporate seal, does not bind it if it appears by its charter, or by reasonable inference therefrom, that the deed is *ultra vires*, notwithstanding the grantee is another corporation which is authorized, in lieu of constructing a railroad, to purchase any such road with all the rights, powers, and franchises connected therewith; it being necessary, to constitute a valid sale, not only that the purchaser shall be competent to take, but also that the vendor shall be clothed with the legal power and capacity to sell and convey the title. State v. Consolidation Coal Co., 46 Md. 1.

⁴ Bruffet v. Gt. Western R.R. Co., 25 Ill. 353.

a sum of money to a railroad company to be secured by the bonds of the company which was afterward consolidated with other companies, it was held that a suit could not be maintained on the contract by the consolidated company upon a tender of its bonds. The court said: "The defendant had a right to stipulate for the bonds of a particular company, and it is clear he cannot be required to accept, in lieu of the promised consideration, the obligation of any other company, no matter how much the latter may exceed in value the former. There is no legal mode in which the contract of a man can be improved for him against his consent. As the bond of the contracting company formed the entire consideration for the promise of the defendant, if such company have put it out of its power to render such bond to the defendant, it has destroyed this contract by its own voluntary act, and has in consequence discharged the defendant. . . . The consolidated companies, in the nature of things, cannot be the same as one of their constituents. Such a company has larger purposes, wider powers, and heavier responsibilities than those inherent in either of its component parts."¹

The consent of creditors to the consolidation is not necessary, their rights not being affected by it; though provision is frequently made in the act authorizing the consolidation for the payment of the claims of creditors who are not entitled to look to the new body under their original contracts, unless it has assumed the obligations.² An act for the consolidation of three railroad companies provided that all of the property belonging to each of the companies thus united should become vested in the new corporation

¹ N. J. Midland R.R. Co. v. Strait, 35 N. J. (6 Vroom) 322. Western Union R.R. Co. v. Smith, 75 Ill. 496. See Houston, etc., R.R. Co. v.

² Prouty v. Lake Shore, etc., R.R. Co., 52 N. Y. 363; Selma, Rome, etc., R.R. Co. v. Harbin, 40 Ga. 706; Shaw v. Norfolk Co. R.R. Co., 16 Gray, 407; Shirley, 54 Texas, 125; Warren v. Mobile, etc., R.R. Co., 49 Ala. 582; Welsh v. First Division of the St. Paul, etc., R.R. Co., 25 Minn. 314.

as its own, subject to the liens and incumbrances then existing upon it, and to the rights of their respective creditors to resort to it as a fund from which they might derive payment of their claims; that "all the franchises, property, powers, and privileges now enjoyed by, and all of the restrictions, liabilities, and obligations imposed upon said corporations by virtue of their respective charters, shall appertain to said united corporations, in the same manner as if the same had been contained in or acquired under an original charter." It was held that there was not imposed upon the new corporation the obligation to pay the debts of the former corporations, nor was it subject to any liability to their creditors; and that the new company might purchase outstanding bonds of one of the old companies and hold them like other creditors, or pay and extinguish them for the relief and discharge of the property.¹

If nothing to the contrary is indicated, the liabilities of each company when acting separately exist as before in the hands of the new organization,² liens upon the property of the several corporations continuing after their consolidation. According to some of the decisions, there is an implied assumption on the part of the new corporation of all of the liabilities.³ But this would not necessarily follow.

¹ *Shaw v. Norfolk Co. R.R. Co., supra*. See *Indianola R.R. Co. v. Fryer*, 56 Texas, 609; *People v. Empire Mu. Life Ins. Co.*, 92 N. Y. 105. An act for the consolidation of several railroad companies provided that each company should continue liable to third persons for obligations incurred by it previous to the consolidation. The consolidated company, however, as an additional security to creditors, undertook and agreed to pay the debts of each of the old companies. In a suit which was pending against one of the companies previous to the consolidation, it was held that a judgment could not be ren-

dered against the consolidated company without making it a party. *Selma, etc., R.R. Co. v. Harbin, supra*.

² *State v. Greene County*, 54 Mo. 540; *Scotland v. Thomas, supra*; *Chesapeake & Ohio R.R. Co. v. Virginia*, *Ib.* 718; *County of Henry v. Nicolay*, 95 U. S. 619; *Fisher v. N. Y. Centr., etc., R.R. Co.*, 46 N. Y. 644; *Peoria & Rock Island R.R. Co. v. Coal Valley Mining Co.*, 68 Ill. 489.

³ *Indianapolis, etc., R.R. Co. v. Jones*, 29 Ind. 465; *Columbus, etc., R.R. Co. v. Powell*, 40 Id. 37; *Montgomery & West Point R.R. Co. v. Boring*, 51 Ga. 582; *Thompson v. Abbott*, 61 Mo. 176;

Upon the consolidation under authority of statute of two or more solvent corporations, the business of the old corporations is not wound up, nor their property sequestered or distributed, but the object of the consolidation and of the statutes which permit it, is to continue the business of the old corporations. Whether the old corporations are dissolved into the new corporation, or are continued in existence under a new name with new powers, and whether in either case the consolidated company takes the property of each of the old corporations charged with a lien for the payment of the debts of the corporation, depend upon the terms of the agreement of consolidation, and of the statutes under which the consolidation is effected.¹

§ 156. Consolidation of corporations created by different States.—There is no reason, technical or otherwise, why several States may not, by competent legislation, combine two or more pre-existing corporations which are respectively located therein, into a single organization, or why one State may not make a corporation of another State a corporation of its own, in relation to property within its limits, particularly when the public interest will thereby be promoted; and this power is frequently exercised in the case of railroad companies owning portions of a continuous line. Although the body thus formed is a new corporation, at least *de facto*, and succeeds to the rights and duties of

Paine v. Lake Erie, etc., R.R. Co., 31 Ind. 383; Rome, etc., R.R. Co. v. Ontario, etc., R.R. Co., 16 Hun, 445; Miller v. Lancaster, 5 Coldw. 514. Where a railroad company purchases at foreclosure sale the property and franchises of another company for the purpose of operating the same, it will only be bound by such contracts of the former company as are a lien upon the property and franchises. City of Menasha v. Milwaukee & Northern R.R. Co., 52 Wis. 414. An act of union or consol-

idation of a corporation with three others, under a law which continues all its liabilities, is not such a dissolution of the corporation as abates an action commenced before the consolidation is effected. Balt. & Susquehanna R.R. Co. v. Musselman, 2 Grant's Cas. 348; Shackelford v. Miss. Centr. R.R. Co., 52 Miss. 159; East Tenn., etc., R.R. Co. v. Evans, 6 Heisk. Tenn. 607.

¹ Wabash, etc., R.R. Co. v. Ham, 114 U. S. 587.

the several corporations,¹ yet its status is that of an association incorporated in and by each of the States; and when acting as a corporation in either of the States, it does so under the charter of that State, the legislation of the other State having no operation beyond its territorial limits.² In other words, it is a domestic legal entity to the extent of the power derived from the State under which it acts, and a foreign corporation in respect to the other sources of its existence;³ the corporation existing in both

¹ Bishop v. Brainerd, 28 Conn. 289; Atlanta, etc., R.R. Co. v. State, 63 Ga. 483; Mead v. N. Y., Housatonic & Northern R.R. Co., 45 Conn. 199. Where a corporation was created by the concurrent acts of the legislatures of two States, it was held capable of acting as one body in either State, and liable to be treated as such. State v. Metz, 32 N. J. 199. In another case, the court said: "A very grave question is presented in the argument as to the power of two States to create one corporation. It is claimed that to maintain this action, the consolidation must have resulted in the formation of one company, and that this is simply impossible. It is admitted by the counsel for the appellants that the effect of the consolidation might be to create two corporations with the same name and stockholders, a unity of stock and interest. The suit in our view can well be maintained under either view." Paine v. Lake Erie & Louisville R.R. Co., 31 Ind. 283.

² Quincy Bridge Co. v. Adams County, 88 Ill. 65. When two corporations created in different States consolidate, though for most purposes they are not thereafter to be separately regarded, yet in each State the consolidated company is deemed to stand in the place of the corporation to which it there succeeded, and consequently to be a citizen of that State for many pur-

poses, while in the other State it would stand in the place of the other corporation in respect to citizenship there. Chicago, etc., R.R. Co. v. Auditor-General, 53 Mich. 79, per COOLEY, Ch. J. In Massachusetts it is provided by statute (of 1871, ch. 389), that every railroad corporation, whether consolidated with roads in other States or maintaining a road wholly within the limits of the State, must procure the authority of the State before it can increase its capital stock or extend its line. Attorney-General v. Boston & Me. R.R. Co., 109 Mass. 99.

³ State v. Northern Cent. R.R. Co., 18 Md. 193; Balt. & Ohio R.R. Co. v. Glenn, 28 Id. 287; Chicago, etc., R.R. Co. v. Auditor-General, 53 Mich. 79; Sage v. Lake Shore, etc., R.R. Co., 70 N. Y. 220; Sprague v. Hartford R.R. Co., 5 R. I. 233; Ohio & Miss. R.R. Co. v. Wheeler, 1 Black. 286; McGregor v. Erie R.R. Co., 35 N. J. (6 Vroom) 89; Binney's Case, 2 Bland Ch. 89. An act of Virginia authorizing a railroad company to construct their road through a portion of the State, recited that the company had previously been incorporated by an act of the legislature of Pennsylvania, and provided that the company, as to all its rights, property, franchises, powers, duties, and obligations, should be governed by and be subject to the provisions of the code of Virginia. It was held that the

States, not by the law of courtesy, but by virtue of a charter granted by each State.¹ If two States should incorporate the same persons for the same purpose, with identical powers, and both were managed as one body by one set of officers and directors, there would still be, in contemplation of law, two corporations deriving their authority from different sources. Each State might consent to the consolidation, but the laws of one State could not confer upon the new corporation all the powers, and charge it with all the duties of both of the original corporations.² It has sometimes been maintained that the joint act of two States in incorporating a railroad company is not only a contract with the company, but a compact between the States; that the charter is to be liberally construed with reference to its object, and is the law of the contracting States, like a treaty, without being subject to the local usages of either, and that it must receive the same construction in both.³ It is difficult, however, to see, in the relation the States sustain to each other in such a case, anything like a compact.⁴ Where the corporation

company thus constituted was a Virginia corporation. *Goshorn v. Supervisors*, 1 W. Va. 308. See *Ohio, etc., R.R. Co. v. Weber*, 96 Ill. 443.

¹ *Cook v. Hager*, 3 Col. 386. Where two railroad companies, forming a continuous line in two States, are consolidated, but the articles of consolidation having no seal attached, are void in one of the States, an act afterward passed by the legislature of that State, ratifying and confirming the consolidation, legalizes it. *Fisher v. Evansville, etc., R.R. Co.*, 7 Ind. 407.

² *Racine & Miss. R.R. Co. v. Farmers' Loan & Trust Co.*, 49 Ill. 331; *State Treasurer v. Auditor-General*, 46 Mich. 224; *Farnum v. Blackstone Canal Corp.*, 1 Sumner, 46; *Ohio & Miss. R.R. Co. v. Wheeler*, 1 Black.

286. See *Philadelphia & Wilmington R.R. Co. v. Maryland*, 10 How. 376; *Mead v. N. Y., Housatonic & Northern R.R. Co.*, 45 Conn. 199. In a case in Ohio it was said: "A corporation which is chartered and organized under the laws of two States, the charters being in all respects identical, except as to the source from which they emanate, is a single corporation clothed with the powers of two, and has a legal domicile in each State." *Covington, etc., Bridge Co. v. Mayer*, 31 Ohio St. 317.

³ *Brocket v. Ohio & Pa. R.R. Co.*, 14 Pa. St. 244, per GIBSON, C. J.; *S. P. Cleveland & Pittsburg R.R. Co. v. Spear*, 56 Id. 325.

⁴ Where a corporation which has been created by one State obtains the

exists by the laws of several States, the authority of one of the States over the charter originally granted to it, cannot be abridged by the proceedings of the other States;¹ but the courts will maintain and enforce all the rights of the State against its own corporation, notwithstanding any immunities the corporation may claim to possess within the jurisdiction of another State.² It was remarked by the court in an early case in North Carolina, with reference to a continuous line of railroad: "We are not prepared to say, where, by the charters of two States, the work is executed as one whole, by subscriptions of stock, applicable alike to the parts in each State, that one of the States could not insist as the ground of forfeiture of so much of the franchise as is within it, that the corporation had not fulfilled its duties in the other State, but violated them to the prejudice of the complaining State. For example, if the charter required that the whole work should be completed by a day limited, and the company made the road in North Carolina, but did not make that in Virginia, would it not be a forfeiture of the part in this State, both because

consent of the adjoining State to exercise corporate powers therein, there is not a compact or agreement by which corresponding legislation must be obtained from each State before an amendment can be made to the charter, or additional power given to the corporation. *Covington v. Covington & Cincinnati Bridge Co.*, 10 Bush. 69.

¹ *Hart v. Boston, Hartford & Erie R.R. Co.*, 40 Conn. 524; *New Albany, etc., R.R. Co. v. Huff*, 19 Ind. 444; *Wheat. Int. Law*, 280, 286.

² *Com. v. Pittsburg & Cornellville R.R. Co.*, 58 Pa. St. 26. "It may be, but we do not so decide, that this State might grant jurisdiction to the courts of another State, or at least grant the right to another State to authorize her courts to act on certain matters in this

State, or to constitute a court in this State to act upon the rights and property of the citizens of such other State in this State. Nations by treaties provide for something akin to this. But we do not think that the mere grant of authority to a foreign corporation to exercise its franchises and hold property in this State can be construed as containing a grant of judicial jurisdiction to foreign courts over the property of such corporations in this State. Such a jurisdiction is not a necessity. It is scarcely consistent with the rights of our people or the dignity of the State. The courts of this State are competent to afford all necessary relief in rendering domestic, and in executing foreign judgments." *Eaton & Hamilton R.R. Co. v. Hunt*, 20 Ind. 457.

the omission was against the letter of the act, and because it impaired the utility of the part here, by the interruption of the intended line of transportation and travel?"¹ Pursuant to the acts of two States, railroad companies therein forming a continuous line were consolidated, taking a new name, and organizing a single board of directors. The new company thereupon executed a deed of trust covering the entire line of railway, including all of the personal property which formerly belonged to the companies. It was held that the court had power to appoint a receiver for the whole property, though if persons outside the jurisdiction of the court seized the property, the receiver might be compelled to ask the assistance of the courts of that jurisdiction to aid him in obtaining possession as a matter of comity.² The jurisdictional effect of the existence of such a corporation as regards the Federal courts, is the same as that of a copartnership of individual citizens residing in different States.³

¹ Attorney-General v. Petersburg & Roanoke R.R. Co., 6 Ired. 456, per RUFFIN, C. J.

² Wilmer v. Atlanta & Richmond Air Line R.R. Co., 2 Woods, 409.

³ Railroad Co. v. Harris, 12 Wall. 65; Railroad Co. v. Whitton, 13 Id. 270; Muller v. Dows, 94 U. S. 444. See Blackburn v. Selma, etc., R.R. Co., 2 Flippin, 525. According to Grant, "the old law was that every corporation must be constituted of some place. But it is presumed that this rule has long been obsolete, if it ever held good, except in the cases of corporations intrusted with some local jurisdiction, or with power and privileges the exercise of which was from their nature connected with some locality." Grant on Corp. 14. In the United States, corporations are treated as having domi-

ciles or residences in determining the question of jurisdiction of the courts of the several States, and as between the State and Federal courts, and also upon general principles. When the charters do not specify a locality, corporations are regarded as having their domiciles in the States in which they are created, and have their principal places of business. A charter which empowers a corporation to own and manage property in another State, does not authorize the corporation to change its domicile to that State; and authority given to the latter State to act therein, does not confer upon it, in the absence of authority from the State of its creation, the right to migrate to the other State. Aspinwall v. Ohio & Miss. R.R. Co., 20 Ind. 492.

CHAPTER X.

POWER TO CONTRACT, AND HEREIN OF ULTRA VIRES.

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| § 157. Capacity to contract in general. | § 161. Rule as to contracts which are |
| 158. Meaning and nature of franchises. | <i>ultra vires</i> . |
| 159. Alienation of corporate franchises. | 162. Contract of directors or officers for their own benefit. |
| 160. Meaning of the term, <i>ultra vires</i> . | 163. In what manner a corporation may contract. |

§ 157. **Capacity to contract in general.**—A corporation and an individual do not stand upon the same footing with regard to the right of contracting. The latter may make all contracts which in the eye of the law are not inconsistent with the interests of society; whereas, the former, being created for a specific purpose, must look to its charter, which is, as it were, the law of its nature, to ascertain the extent of its capacity. It cannot only make no contract forbidden by its charter, but it can only make those which are required to effectuate the purposes of its creation.¹ It is said in a late work that the result of the English authorities is, "That corporations,—certainly those for commercial purposes, and probably all corporations to which the doctrine applies,—have by implication all capacities and powers which, being reasonably incidental to their enterprise or operations, are not forbidden them, either expressly by their constating instruments, or by necessary inference therefrom."² They may enter into any obligation or con-

¹ Blair v. Perpetual Ins. Co., 10 Mo. 562; Beach v. Fulton Bank, 3 Wend. 573.

² Green's Brice's Ultra Vires, 2d Am. Ed. 40. See Brady v. Mayor, etc., of Brooklyn, 1 Barb. 584.

tract essential to the transaction of their ordinary affairs, the same that a natural person could do, unless restrained by law.¹ As a general rule, a corporation has the capacity as such to take and grant property. When created for some limited and specific purpose, which is usually the case, the general powers incident to it at common law are restricted by the nature and object of its institution, being authorized to make all contracts which are called for and customary in the course of the business it transacts, as a means to enable it to effect such object, unless expressly prohibited by law or by the provisions of its charter. When it has power to dispose of its property, it may in general dispose of any interest in the same it deems expedient, whether by lease, grant in fee, or for life, mortgage, or even make an assignment for the benefit of creditors, giving preferences where the law admits of such assignments by natural persons.²

¹ *McKiernan v. Lenzen*, 56 Cal. 61. By the civil law, corporations possess only *jura minorum*. They have not the power of contracting on all subjects like persons of full age, and *sua juris*. Having only such powers as are conferred by their acts of incorporation, they cannot be bound for contracts made by those not authorized to represent them. But it is said that a corporation may be bound on a *quasi* contract arising *ex æquo et bono*. So may a minor. But then it must be for necessities which the tutor would not provide, or things which have augmented the minor's estate, and not those things which have been consumed by use, or lost in speculations. *Seibrecht v. New Orleans*, 12 La. An. 496.

² It was held in Massachusetts, that the directors of a trading corporation which was insolvent, had authority to make an assignment of all of the corporate property to one of its creditors provisionally and upon condition to

pay, or provide for the payment of the debt, with security that no more should be applied than was required for that purpose, to account for such application, and pay over the balance, if any, to the treasurer of the corporation. *Sargent v. Webster*, 13 Metc. 497. See *Harris v. Thompson*, 15 Barb. 62. "Whether it is expedient that a corporation which has so conducted its affairs as to become insolvent, should have the power, by a general assignment, to appoint its own administrators, or whether an insolvent individual ought to have power to appoint his own assignee, and to give preferences, are questions which belong to the legislature." WALWORTH, Ch., in *De Ruyter v. Trustees of St. Peter's Church*, 3 Barb. Ch. 119. A corporation has a right to make such an assignment, and may exercise it to the same extent and in the same manner as a natural person, unless restricted by its charter, or by some statutory provision. *Ib.*; S. C. 3 Comst. 238. See

Upon this principle, and to the extent stated, a corporation, in order to attain its legitimate objects, may deal precisely as an individual may who seeks to accomplish the same ends.¹

A municipal, like a trading corporation, may, unless restricted by its charter, enter into any contract, give promissory notes, and adopt all the ordinary or usual means which may be necessary to the full execution or enjoyment of the powers expressly conferred.² By the charter of a city, the mayor and common council were given power to make all contracts in their corporate capacity which they might deem necessary for the welfare of the city not in conflict with the constitution of the State and the United States, and to levy a tax for the fulfilment of the same. It was held that they were authorized to make a contract for the construction of water-works.³

The act under which a railroad company was incorporated having provided that the company might contract for

Bowen v. Lease, 5 Hill, 221; Hurlburt v. Carter, 21 Barb. 221; State v. Bank of Maryland, 6 Gill & Johns. 205; State v. Bank of Manchester, 13 Smed. & Marsh, 569.

¹ Barry v. Merchants' Exchange Co., 1 Sandf. Ch. 280; Thompson v. Lambert, 44 Iowa, 239; Ohio Life Ins. Co. v. Merchants' Ins. Co., 11 Humph. 1; Old Colony R.R. Co. v. Evans, 6 Gray, 25; White Water, etc., Co. v. Valette, 21 How. 414; Clark v. Farrington, 11 Wis. 306. See Mott v. Hicks, 1 Cowen, 513; Barker v. Merchants' Ins. Co., 3 Wend. 96; Jackson v. Brown, 5 Id. 590; Moss v. Oakley, 2 Hill, 265; Saford v. Wyckoff, 4 Id. 442; Atty. Genl. v. Life Ins. Co., 9 Paige Ch. 470. The congregation of a Presbyterian society, at a meeting duly convened, adopted the following: "Resolved, That we, the congregation of, (naming the society), now assembled, in view of our pastor

having spent all his ministerial life with us in ardent and successful labor, upon a salary entirely inadequate to his comfortable support, while expending much in behalf of the congregation, approve and ratify the action and proposal of the joint officers, trustees, elders, and deacons of the church in tendering him a pecuniary offering, and we, the congregation, hereby order that a credit be given him of two thousand dollars upon the bond and mortgage held by the congregation upon the former parsonage farm in his behalf as pastor." It was held that the agreement to give the credit was supported by a sufficient consideration, and that the pastor was entitled to an injunction to restrain an action at law upon the bond. Worrell v. First Presby. Ch., 23 N. J. Eq. 96.

² Douglass v. Va. City, 5 Nevada, 147.

³ Rome v. Cabot, 28 Ga. 50.

the transportation and delivery of persons and property conveyed over its road beyond its termini, it was held that the power thus conferred carried with it power to use necessary and proper incidental means of exercising and enjoying it, and that a note for the purchase money of a steam ferry-boat given by the company for the carrying of freight and passengers from the terminus of its road to the line of another road, was binding on the company.¹ Where a railroad company brought a suit upon a contract by which the defendant undertook to provide a suitable steam vessel to run between Milford Haven, the terminus of the road, and Dublin and Cork, for the conveyance of passengers, goods, etc., in connection with the railroad, and the defendant furnished an unseaworthy vessel, and an incompetent master, in consequence of which certain live-stock were damaged and lost, it was held that the contract was not illegal, it being in furtherance of the company's incorporation. EARLE, C. J., said: "In all the cases that I am aware of, where the contract has been held illegal, the object to be effected was something wholly unconnected with the purposes of the incorporation. One of the earliest cases was that of the Harwich Steam Packet Company,² where it was held that, as between the shareholders and directors of the company, the diversion of a portion of the capital to the support of a concern foreign to the objects of its incorporation was a breach of trust. But there the company were in a given event to purchase the steam vessels. An entirely different question, however, is raised in a court of law when it is alleged that the funds of the company are applied to a purpose entirely unconnected with the purpose of its incorporation. In the present case, so far as I can see, this is not a contract which has for its purpose something entirely *ultra vires*. So far from a contract

¹ Shawmut Bank v. Pittsburgh, etc., R.R. Co., 31 Vt. 491.

² Colman v. Eastern Counties R.R. Co., 10 Beavan, 1.

by this company to facilitate the forwarding of passengers and goods to Ireland being illegal, I rather gather that the legislature contemplated and intended that a railway terminating at Milford Haven should forward traffic to and from Ireland, and, therefore, this contract would be entirely within the scope and object of the company's incorporation or extension." WILLES, J.: "I am of the same opinion. All that the contract, as it appears on the face of the declaration, amounts to is this, that the railway company have bargained with the defendant to provide a means by which the passengers and goods carried by their line may be safely and speedily conveyed to and from Ireland. It is a mere arrangement as to the times at which the steam vessel employed for the service shall start and arrive, and a stipulation that it shall be proper for the purpose. I cannot distinguish that, in principle, from the ordinary case of a railway company providing warehouses for the storage of goods intrusted to them. It is one of the incidents to the due employment of the railway. I see nothing at all invalid in the contract."¹

Every corporation has the right to pay its debts or provide for their payment in such mode as it and the holders of the indebtedness may agree; or it may fund its debts if that be deemed best, and issue the necessary evidences of the same. If the evidence of the debt be scrip, or promissory notes, the corporation may change the form of the indebtedness to interest-bearing bonds, without express authority in the charter.² A corporation which issues a coupon

¹ South Wales R.R. Co. v. Redmond, 10 C. B. N. S. 675.

² Galena v. Corwith, 48 Ill. 423. An action was brought against the maker of a promissory note, payable to the order of a railroad company. The note was given as a renewal accommodation paper originally given by the defendant, who was one of the directors

of the company, to raise money to pay the company's debts. It was subsequently indorsed with the knowledge and assent of the defendant by the company in the course of its regular and lawful business. It was held that, as the railroad company had, as a necessary incident, the inherent power to borrow money for the payment of its

bond is in the position of a maker of a promissory note, not of the drawer of a check or bill of exchange. There is no obligation on the holder to present and demand it within a reasonable time. The same rule applies to the coupons as to the bond. In fact, the holder may retain the coupon as long as he can keep the bonds, without requiring payment. The coupon is nothing but an acknowledgment of interest due, and it is but an incident of the principal.¹ An express authority is not indispensable to confer upon a corporation the right to borrow money, to deal on credit, or to become a party to a promissory note or bill of exchange. It is generally sufficient if such right be implied as the usual and proper means to accomplish the purposes of the charter.² A corporation, the capital stock of which was limited to one million of dollars, was authorized by its charter to pur-

debt, and for its necessary purposes, it was authorized to hold and transfer the note in suit, and that consequently the plaintiff was entitled to judgment. *Lucas v. Pitney*, 27 N. J. (3 Dutcher) 221.

¹ *Williamsport Gas Co. v. Pinkerton*, 95 Pa. St. 62. An agreement between railroad companies with connecting lines to adopt on their several roads a uniform gauge in order to increase the business on each, is a good consideration for a guaranty by one of the companies of the payment of the coupons issued by another; and the holder of a guaranteed coupon will be protected, in the absence of anything suggesting inquiry, that the company may not have proceeded regularly in the execution of its powers. *Conn. Mu. Life Ins. Co. v. Cleveland, etc., R.R. Co.*, 41 Barb. 9.

² *Curtis v. Leavitt*, 15 N. Y. 218, 219; *R.R. Co. v. Howard*, 7 Wall. 392; *Booth v. Robinson*, 55 Md. 603. The charter of a railroad company authorized the borrowing of money by the company "on such terms as might

be agreed upon by the parties." It was held that this gave the company the right to borrow money at a rate of interest beyond that established by the general law of the State. *Morrison v. Eaton & Hamilton R.R. Co.*, 14 Ind. 110. *PERKINS, J.*: "That the clause was inserted in the charter expressly to enable the corporation to borrow money on such higher rate of interest, we have no doubt, and if it failed to accomplish that end, its insertion was nugatory, — powerless for any purpose whatever; for as to all the other terms of the contract of loan, the general grant of power to borrow, perhaps indeed the simple creation of the corporation, would have been adequate. We know historically that at the time the charter in question was granted, money could not be obtained by such corporations at six per cent., the legal rate of interest; and hence, in the application for charters, special powers on the subject were usually sought. They were sought to enable the corporations to give a rate of interest that would induce the loan."

chase, hold, and convey such and so much real estate as it should deem necessary and proper for the purpose of erecting an edifice for a public mercantile exchange in the city of New York. The first structure having been destroyed by fire, the corporation purchased more land and rebuilt on a larger scale at a total cost of over two millions of dollars, but without any increase of the capital. The charter did not expressly authorize the borrowing of money. It was held that the corporation was not restricted in the erection of the exchange to an expenditure of one million of dollars, but that the entire expense might be defrayed by means of loans procured upon the corporation bonds secured by one or more mortgages executed in trust. The assistant vice-chancellor said: "A corporation, in order to attain its legitimate objects, may deal precisely as an individual may who seeks to accomplish the same ends. If chartered for the purpose of building a bridge, it may contract a debt for labor, materials, or the land upon which the bridge is abutted. If more advantageous, it may borrow money to purchase such land or materials, or to pay for such labor; and, as evidence of the indebtedness, it may execute to the creditors a note, a bond, or a mortgage, whether the debt be for the money borrowed, or the work, materials, or land."¹ Where an insurance company was authorized to receive money on deposit; collect promissory notes and bills of exchange; purchase, discount, and sell notes and bills; and borrow money and issue the bonds of the company therefor, it was held that the company was not restricted to the giving of its bonds, but had the implied and incidental power to make other usual securities and evidences of debt.² But where a life insurance and trust company was incorporated with a capital of a million of dollars, to be

¹ *Barry v. Merchants' Exchange Co.*, 1 Sandf.Ch. 280. See *King v. Merchants' Exchange Co.*, 5 N. Y. (1 Seld.) 547. ² *Talladega Ins. Co. v. Peacock*, 67 Ala. 253.

paid in cash and money received in trust, one half to be invested in bonds or notes secured by mortgage on land within the State, and the other half, together with premiums and profits and moneys received in trust, to be invested, in the discretion of the company, in stocks loaned to any city, county, or company, or in such real or personal security as it might deem proper, it was held that the company had no power to lend its obligations to pay money in future and exchange such obligations for the bonds of an individual in the same amount, and that a bond so taken was void.¹ A railroad company may guarantee the payment of such bonds as it may have received from cities and counties, in order to raise money to carry out the purposes for which it is incorporated, augment its credit, and save the necessity of issuing its own bonds.² A manufacturing corporation having sold to the plaintiff goods in a store belonging to the company under a contract that if the trustees of the company should at any time within a year no longer have the management of its affairs, and, in consequence, the trade of the workmen employed by the company should be withdrawn from the store to the plaintiff's damage, the company would pay the plaintiff \$300, or deduct that amount from any sum the plaintiff might then owe the company, it was held that in the absence of proof to the contrary, it would be presumed that the contract was valid.³ Where an incorporated building society was authorized by its charter to make loans and provide for the securing of the same on real estate, it was held that as an incident to such security, it might contract for insurance.⁴ A provision in the charter prohibiting the corporation from dealing in commercial

¹ Smith v. Ala. Life Ins. & Trust Co.,
4 Ala. 558.

² R.R. Co. v. Howard, 7 Wall.
392.

³ De Groff v. Am. Linen Thread Co.,
21 N. Y. 124.

⁴ Chicago Building Soc. v. Crowell,
65 Ill. 453.

paper, will not be construed to extend to receiving and selling notes given for the sale of its land.¹

§ 158. **Meaning and nature of franchises.**—Franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country generally of common right.² The word franchise has various significations. A corporation itself is a franchise belonging to its members, and it may possess other franchises, such as the right to hold and dispose of property. A corporation is made up and consists of its rights and privileges; and when all of its franchises are gone by surrender, by forfeiture judicially ascertained, by limitation of the grant, or in any other way, the corporation has no longer any practical existence. If the franchises are of a nature to continue after they are lost by the corporation, they may be regranted to another corporation or to other individuals; but the former corporation is substantially dissolved; though in some cases, after the franchises of a corporation are lost by forfeiture, the corporation is still held to exist in contemplation of law so far as to be capable of being revived by a regrant.³

The older English authorities regarded franchises as being mere donations of the sovereign to be treated strictly and jealously. Hallam,⁴ speaking of the reign of Elizabeth, says: "The crown either possessed or assumed the prerogative of regulating almost all matters of commerce

¹ *Buckley v. Briggs*, 30 Mo. 452.

² *Bank of Augusta v. Earle*, 13 Pet. 595, per TANEY, Ch. J. "A franchise is a species of incorporeal hereditament. It is defined by Finch, 164, to be a royal privilege or a branch of the king's prerogative subsisting in the hands of the subject; and he says that franchises being derived from the crown, they must arise from the king's grant, or, in some cases, may be held

by prescription which presupposes a grant; that the kinds are various and almost infinite, and they may be vested in natural persons, or in bodies politic." SPENCER, J., in *People v. Utica Ins. Co.*, 15 Johns. 358.

³ *Pierce v. Emery*, 32 N. H. 484; *Bridgeport v. N. Y. & N. H. R.R. Co.*, 36 Conn. 266; *Paul v. Virginia*, 8 Wall. 168.

⁴ *Const. Hist. of England*, vol. 1, ch. 5.

at its discretion. Patents to deal exclusively in particular articles, generally of foreign growth, but reaching in some instances to such important necessities of life as salt, leather, and coal, had been lavishly granted to the courtiers with little direct advantage to the revenue. They sold them to companies of merchants who, of course, enhanced the price to the utmost ability of the purchaser." But the advance of liberty, of commerce, and the arts and conveniences of life, have given to franchises a higher character of public utility. They have become contracts between the sovereign power and the private citizen, made upon valuable consideration for purposes of public benefit as well as of private advantage.¹ The powers and privileges which constitute the franchise of a corporation are in a just sense property distinct from the property which by the use of such franchise the corporation may acquire, and taxable according to its assessed value.²

§ 159. Alienation of corporate franchises.—A corporation cannot transfer its own existence into another body, nor enable natural persons to act in its name save as its agents, or as members of the corporation, proceeding in conformity with the modes required or allowed by its charter. The franchise to the corporation is not, therefore, a subject of sale and transfer, unless the law by some positive provision

¹ See *Thompson v. People*, 23 Wend. 537, opinion of Verplanck, senator.

² *Monroe Savings Bank v. Rochester*, 37 N. Y. 367; *Freight Tax Case*, 15 Wall. 282; *State Tax on R.R. Gross Receipts*, *Ib.* 296; *State R.R. Tax Cases*, 92 U. S. 575; *Com. v. Cary Improvement Co.*, 98 Mass. 23; *Porter v. Rockford*, etc., *R.R. Co.*, 76 Ill. 561; *Com. v. Hamilton Manf. Co.*, 12 Allen, 298; *Burke v. Badlam*, 57 Cal. 594; *San Jose Gas Co. v. January*, *Ib.* 614; *Spring Valley Water Works v. Schotter*, 62 Cal. 69. A legislative grant of

an exclusive right to supply gas or water to a municipal corporation by pipes laid through the public streets is a grant of a franchise, and a contract protected by the Constitution of the United States. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *Louisville Gas Co. v. Citizens' Gas Co.*, *Ib.* 683; *New Orleans Water Works v. Rivers*, *Ib.* 674. Such a right may, however, be a mere license, conferred by the municipal authorities. *People v. Mu. Gas Light Co.*, 38 Mich. 154.

has made it so and pointed out the manner in which such sale and transfer may be effected.¹ When a corporation has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of its duties being the consideration of the grant, any contract which disables the corporation from discharging its functions, by undertaking, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which the charter imposes, is a violation of the contract with the State, and is void as against public policy.² This rule is founded on reason and principle. Franchises granted by the State are often parts of the sovereign power delegated to a subject, and always privileges to which other citizens are not entitled. In these grants, the legislature is presumed to have regard to the character of the grantee, and the guards and restrictions placed upon the corporation.³ Where the charter of a municipal corpora-

¹ Branch v. Jessup, 106 U. S. 468; Hall v. Sullivan R.R. Co., 22 L. R. 138; Shaw v. Norfolk County, 5 Gray, 162; Pollard v. Maddox, 28 Ala. 321.

² Beman v. Rufford, 1 Sim. N. S. 550; Gt. Northern R.R. Co. v. Eastern Counties R.R. Co., 9 Hare, 306; South Yorkshire R.R. Co. v. Gt. Northern R.R. Co., 3 De G. M. & G. 376; 9 Exch. 84; 19 Eng. L. & Eq. 513; York, etc., R.R. Co. v. Winans, 17 How. 30; Thomas v. R.R. Co., 101 U. S. 71; Black v. Del. & Raritan Canal Co., 22 N. J. Eq. 130; S. C. 24 N. J. 455; Hays v. Ottawa, etc., R.R. Co., 61 Ill. 422. "The franchise being an incorporeal hereditament, cannot, upon the settled principles of the common law, be seized under a *feri facias*. If it can be done in any of the States, it must be under a statutory provision of the State." Gue v. Tide Water Canal Co., 24 How. 257, per TANEY, C. J.

³ Shrewsbury, etc., R.R. Co. v. North Western R.R. Co., 6 House of Lds. 113; East Anglican R.R. Co. v. Eastern Counties R.R. Co., 73 Eng. Com. L. 775; 11 C. B. 75; Winch v. Birkenhead R.R. Co., 16 Jur. 1035; Troy & Rutland R.R. Co. v. Kerr, 17 Barb. 581, 601; Com. v. Smith, 10 Allen, 448; Richardson v. Sibley, 11 Id. 65; Stewart's Appeal, 56 Pa. St. 413; State v. Consolidation Co., 46 Md. 1; Ohio & Miss. R.R. Co. v. Ind. & Cin. R.R. Co., 14 Am. L. Reg. 733; Lauman v. Lebanon Valley R.R. Co., 30 Pa. St. 42; Susquehanna Canal Co. v. Bonham, 9 Watts & Serg. 27; Coe v. Columbus, etc., R.R. Co., 10 Ohio St. 372; Pullam v. Cincinnati & Chicago R.R. Co., 4 Biss. 35; Phila. v. Western Union Tel. Co., 11 Phila. 327; Treadwell v. Salisbury, 7 Gray, 393.

tion contained a grant of power to draw lotteries for a public purpose named, and upon certain terms and conditions, it was held that the corporation could not release itself from liability by selling the privilege. MARSHALL, C. J., said: "It is reasonable to suppose that Congress, when granting a power to authorize gaming, would feel some solicitude respecting the fairness with which the power should be used, and would take as many precautions against its abuse as was compatible with its beneficial exercise. Accordingly, we find a limitation on the amount to be raised, and on the object for which the lottery may be authorized. . . . The power thus cautiously granted is deposited with the corporation itself, without any indication that it is assignable. It is to be exercised like other corporate powers by the agents of the corporation under its control."¹

Railroad companies being public corporations, so far as to be subjected to control by legislation, they can do no act which would amount to a renunciation of their duty to the public, or directly and necessarily disable them from performing it. They cannot, therefore, convey away their franchises and corporate rights. But they may contract debts, purchase on credit, and mortgage their personal property not affixed to the road, though used in operating it.² A railroad company which has power to construct a railroad and telegraph line, cannot lease its right with reference to the latter.³ Where the charter of a railroad company

¹ Clark v. Corp. of Washington, 12 Wheat. 40.

² Pierce v. Emery, 32 N. H. 484; Richards v. Merrimack, etc., R.R. Co., 44 Id. 127; Stewart v. Jones, 40 Mo. 140. A contract to lease a horse railroad for a fixed rent in a dividend to be paid to the stockholders, is void. Middlesex R.R. Co. v. Boston, etc., R.R. Co., 115 Mass. 347; Pittsburg, etc.,

R.R. Co. v. Bedford, etc., R.R. Co., 81* Pa. St. 106.

³ Atlantic & Pacific Tel. Co. v. Union Pacific R.R. Co., 1 McCrary C.C. 541. In a case in Connecticut, it was insisted that railroad companies were not intended to be embraced by the insolvent law; because the trustee appointed under it would not be invested with the power of selling, leasing, or

does not authorize the company to mortgage or sell its corporate franchise to be a corporation, an act of the legislature undertaking to give such an effect to the sale, is an attempt to create a corporation by a special act.¹ The franchise

operating the road, and that, therefore, the most valuable portion of its property would not be available for the payment of its debts. To this the court replied, that the fact that some of the property of the company was of such a peculiar character that the trustee could not, by his own unassisted power, dispose of or manage it for the benefit of creditors, would be an insufficient ground for concluding that the legislature did not intend that they should have the benefit of such of its property as he could appropriate to their use. *Piatt v. N. Y. & Boston R.R. Co.*, 26 Conn. 514.

¹ *Atkinson v. Marietta, etc., R.R. Co.*, 15 Ohio St. 21. See *Oroville, etc., R.R. Co. v. Plumas County*, 37 Cal. 354. The doctrine that a corporation has no power to mortgage its franchises without the consent of the legislature, has not been universally admitted. In a case in Maine, the court said: "Such mortgages have always been regarded and treated as valid in this State by the courts as well as the legislature, and we confess that the contrary doctrine seems to us little better than practical repudiation, and not supported by reasons sufficiently weighty to commend it to our judgment. The whole argument seems to have no greater force than this, that it is dangerous to the public interests to have the powers and privileges conferred by a railroad franchise transferred from the original corporators to a new body. But when we consider how little importance is attached to the persons of the original corporators, how soon death must and other circumstances may remove them from all participation in the affairs of the road,

how constantly those who have the active management of it are in fact being changed, we shall see how little practical merit this argument has. At the beginning, the corporators undoubtedly have a controlling influence, but afterward the directors are elected by the stockholders and are often changed. Is there any reason to suppose that if a mortgage should by foreclosure transfer the franchise to new hands, as capable men would not be appointed to manage the road as before? Will not the bondholders be as interested and capable of appointing suitable managers as the stockholders? Does any one fear that the public interests would not be as safe with the former as the latter? Why then is it dangerous to the public interests to allow such a transfer? We confess that after giving the matter much thought, the doctrine that all railroad mortgages made without the consent of the legislature are illegal and void, because they may operate as a permanent transfer of the corporate powers from the original corporators to another body, seems to us to have little to commend and much to condemn it." *Shepley v. Atlantic & St. Lawrence R.R. Co.*, 55 Me. 395. And see *Kennebec & Portland R.R. Co. v. Portland, etc., R.R. Co.*, 59 Id. 9. In *Bank of Middlebury v. Edgerton*, 30 Vt. 190, BENNETT, J., said: "It is not necessary in this case that we should hold that the franchise to this company to be a corporation is a subject of sale or transfer. The right to build, own, manage, and run a railroad, or take tolls thereon, is not of necessity of a corporate character or dependent upon corporate rights. It

of being a corporation need not be implied as necessary to secure the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All of the franchises necessary or important to the beneficial use of the railroad, could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the incorporators, while the powers and privileges vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence after the corporation has parted with all its property and all its franchises.¹

The franchise which a railroad company transfers by its mortgage is not its franchise to exist as a corporation, but only such of its franchises or privileges as will enable the grantee to have the same use and beneficial enjoyment of

may belong to and be enjoyed by natural persons, and there is nothing in its nature inconsistent with its being assignable." Approved and adopted in *Miller v. Rutland & Washington R.R. Co.*, 36 Vt. 452, where the court said: "The idea of particular confidence reposed in the particular persons who compose the corporation for the service of the public interests involved in making and operating the proposed railroad, seems to us altogether fanciful and theoretical. In fact, there is no such confidence. From the nature of the case there could not be. For who shall compose the corporation at a given time depends on who own shares of the capital stock,—one set of men to-day,

another to-morrow,—some citizens of the State, some foreigners. The true idea is that the public relies for its assurance that its rights will be duly answered, upon the fact that they must be, in order that the conferred privileges may be held and enjoyed by the corporation of whomsoever composed; not upon any personal confidence which the legislature has in an indiscriminate body of persons."

¹ *Memphis, etc., R.R. Co. v. Commissioners*, 112 U. S. 609; *Bank of Middlebury v. Edgerton*, 30 Vt. 182; *Eldridge v. Smith*, 34 Id. 484; *Smith v. Gower*, 2 Duvall, Ky. 17; *Joy v. Jackson, etc., Plank R. Co.*, 11 Mich. 155.

the property which the company had.¹ Power given to a railroad company to borrow money, to make and execute bonds therefor, and to secure the same by a mortgage of "the entire road, fixtures, and equipments, with all the appurtenances, income, and resources thereof," includes the right to mortgage the franchise of the corporation to maintain its road and make profit from its use, and also property not existing or not owned by the corporation at the time of the mortgage, and to be thereafter acquired, but not the franchise of being a corporation. After an act of disposition which separates the franchise to maintain a railroad, and make profit from its use, from the franchise of being a corporation, until there be judgment of dissolution, the rights of corporators, and of third persons, may require that the corporation be considered as still existing.² The directors of a railroad company were authorized by an act of the legislature to borrow money, to issue bonds therefor, and to secure the same by a mortgage to trustees of the whole, or a part of the real and personal estate, and all of the rights, franchises, powers, and privileges of the company; the deed of the trustees to convey to purchasers all of the real and personal property named in the mortgage, together with all the rights, franchises, powers, and privileges in relation to the same which the corporation possessed at the

¹ *Meyer v. Johnston*, 53 Ala. 237. The franchises to build, own, and manage a railroad, and to take tolls thereon, are not necessarily corporate rights, and there is nothing in their nature inconsistent with their being assignable. *Hall v. Sullivan R.R. Co.*, 21 Law Reporter, 138; 2 *Redfield Am. R.R. Cas.* 621; *New Orleans, etc., R.R. Co. v. Delamore*, 114 U. S. 501.

² *Coe v. Columbus, etc., R.R. Co.*, 10 Ohio St. 372. See *Pierce v. Milwaukee, etc., R.R. Co.*, 24 Wis. 551; *East Boston Freight R.R. Co. v. Eastern*

R.R. Co., 13 Allen, 422; *Lord v. Yonkers Fuel Gas Co.*, 101 N. Y. 614. The City Bank of New Orleans having, shortly before its charter expired, sold to the State Bank of Louisiana all its assets, the latter agreeing to pay dividends to the stockholders of the City Bank the amounts due its depositors and other banks, to redeem its outstanding circulation, and to pay its shareholders the par value of their stock, it was held that the sale was valid. *Stetson v. City Bank of New Orleans*, 12 Ohio St. 577; s. c. 2 Ib. 167.

time the mortgage was executed, and the use of the railroad, with all its property, and rights of property, for the same purposes and to the same extent that the company could use the same, if such deed had not been made. It was held that the corporation had power to mortgage the whole road as an entire thing, with all of its corporate rights and franchises, and incidentally, and by way of accession, all the subsequently acquired property of the road. And where the company, having become the owners of personal property which was subject to the lien of the government for duties, entered into a contract with certain persons that they should pay the duties, and, if the company did not pay them back the money so advanced within an agreed time, they might take and hold possession of such personal property, it was held that the contract was not binding on the trustees, unless they had assented to it.¹

The right of a railroad company to mortgage its road, fixtures, and equipments, with all the appurtenances, income, and resources, does not include the power of eminent domain, which cannot be made the subject of grant or sale. The right to institute a judicial proceeding for the purpose of taking private property for the use of the railroad, cannot be regarded as a franchise of the corporation, but rather a means to secure the enjoyment of the franchise granted, a resort to which may become necessary.² “Such attempted sale and purchase on the part of either corporation, is *ultra vires* in the extreme sense, and is a fraud on the court or judicial officer before whom the proceedings are pending, and whose judgment is employed in determining the necessity of the appropriation to the public use represented by the corporation petitioner, not its necessity to a

¹ *Pierce v. Emery*, 33 N. H. 484. ² *Coe v. Columbus, etc., R.R. Co.*,
See *Detroit v. Mu. Gas, etc., Co.*, 43 *supra*.
Mich. 594.

use represented by another corporation. Much confusion of thought has arisen in this case, and in similar cases, from attaching a vague and undefined meaning to the term franchises. It is often used as synonymous with rights, privileges, and immunities, though of a personal and temporary character ; so that if one of these exists, it is loosely termed a franchise, and is supposed to pass upon a transfer of the franchises of the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value. . . . They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked.”¹

When a corporation under its charter has only power to mortgage its real estate, authority to mortgage its franchise cannot be implied ;² but it is well settled that a corporation can, when authorized by law so to do, transfer, sell, or convey its charter or franchise to be a corporation, and thus vest it in others, and this will include the right to mortgage it.³ “The real transaction in all such cases of transfer, sale, or conveyance, in legal effect, is nothing more or less, and nothing other, than a surrender or abandonment of the old charter by the corporators, and a grant *de novo* of a similar charter to the so-called transferees or purchasers. To look upon it in any other light, and to regard the transaction

¹ Morgan v. Louisiana, 93 U. S. 217 ; 697 ; St. Louis, Iron Mt., etc., R.R. Co. Chesapeake & Ohio R.R. Co. v. Miller, v. Berry, 113 Id. 465 ; Railroad Co. v. Georgia, 98 Id. 359.

² Morgan v. Louisiana, 93 U. S. 217 ; Wilson v. Gaines, 103 Id. 417 ; Louisville, etc., R.R. Co. v. Palmes, 109 Id. 244. See Railroad Co. v. Gaines, 97 U. S.

³ Randolph v. Wilmington, etc., R.R. Co., 11 Phila. 502 ; Willamette Manf. Co. v. Bank of British Columbia, 119 U. S. 191. See McAllister v. Plant, 54 Miss. 106.

as a literal transfer or sale of the charter, is to be deceived, we think, by a mere figure or form of speech. The vital part of the transaction, and that without which it would be a nullity, is the *law* under which the transfer is made. The statute authorizing the transfer and declaring its effect, is the grant of a new charter, couched in a few words, and to take effect upon condition of the surrender or abandonment of the old charter; and the deed of transfer is to be regarded as mere evidence of the surrender or abandonment. According to our understanding of the cases cited by counsel for the defendants in support of the transferability of such charters, this is the view entertained whenever the courts have spoken directly of the legal effect of such conveyances. . . . It matters not if we regard the charter granted as identical with the one surrendered—a something which really passes from the old or defunct corporation into the hands of the legislature, and thence to the new organization. There must be at the time constitutional power in the legislature not only to receive, but also to reissue the charter. It must pass through legislative hands before it can take life in a new organization.”¹

§ 160. Meaning of the term “*ultra vires*.”—Although the expression, “*ultra vires*,” is used in different senses, its primary meaning is that a corporate act or contract is beyond the powers conferred upon the corporation under any circumstances or for any purpose. The term is frequently employed “with reference to the rights of certain parties when the corporation is not authorized to perform the act without their consent; or with reference to some specific purpose, when it is not authorized to perform it for that purpose; although fully within the scope of the general powers of the corporation, with the consent of the parties interested, or for some other purpose.”² It is a concise

¹ State v. Sherman, 22 Ohio St. 411,
per WELCH, C. J.

² McPherson v. Foster, 43 Iowa, 48
Miners' Ditch v. Zellerbach, 37 Cal.

and convenient form by which to indicate the unauthorized action of artificial persons with limited powers.¹ "Some, if not all corporations, exist for the attainment of certain objects only, and if their powers are not expressly, they are impliedly restricted to such acts only as are necessary for the due attainment of those objects, and consequently they can perform no acts, enter into no transactions, and incur no liability but such as spring out of or are otherwise incidental to the purposes for which they have been created."² When the power is conferred, whether rightfully or not, it cannot properly be said that the act is *ultra vires*. If, however, the act itself is invalid, the power, of course, does not exist.³ As a rule, "when acts of corporations are spoken of as *ultra vires*, it is not intended that they are unlawful, or even such as the corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation, and are in violation of the trust reposed in the managing board by the shareholders, that the affairs shall be managed and the funds applied solely to the carrying out of the objects for which the corporation was created."⁴ It has been correctly observed that "the words '*ultra vires*' and 'illegality' represent totally different and distinct ideas. It is true that a contract may have both these defects, but it may also have one without the other. For example, a bank has no authority to engage, and usually does not engage, in benevolent enterprises. A subscription made by authority of the board of

543; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Bateman v. Mayor, etc.*, of Ashton, 3 Hurlst. & Norm. 323; 2 L. J. Ex. 458; *South Yorkshire R.R. Co. v. Gt. Northern R.R. Co.*, 9 Exch. 84; *Nat. Manure Co. v. Donald*, 28 L. J. Ex. 185, 188. See *Miller v. Milwaukee*, 14 Wis. 642.

¹ *Nat. Pemberton Bank v. Porter*, 125 Mass. 333. "There is nothing of mystery or of sanctity in the use of the words of a dead language, *ultra vires*.

. . . . It is as applicable to individual as to corporate action. An illegal act of an individual is as really *ultra vires* as the unauthorized act of a corporation." *Ib.*, per LORD, J.

² *Green's Brice's Ultra Vires*, 2d Am. Ed. 28.

³ *Freeland v. Pa. Centr. Ins. Co.*, 94 Pa. St. 504.

⁴ *Whitney Arms Co. v. Barlow*, 63 N. Y. 62.

directors and under the corporate seal for the building of a church, or college, or an almshouse, would be clearly *ultra vires*, but it would not be illegal. If every corporator should expressly assent to such an application of the funds; it would still be *ultra vires*, but no wrong would be committed and no public interest violated. So a manufacturing corporation may purchase ground for a school-house, or a place of worship for the intellectual, religious, and moral improvement of its operatives. It may buy tracts and books of instruction for distribution among them. Such dealings are outside of the charter; but so far from being illegal or wrong, they are in themselves benevolent and praiseworthy. So, a church corporation may deal in exchange. This, although *ultra vires*, is not illegal, because dealing in exchange is in itself a lawful business, and there is no State policy in restraint of that business."¹ The term *ultra vires* is sometimes, however, used to denote what is outside of the powers—not of a particular corporation, but of every corporation. By-laws in restraint of trade are *ultra vires* in this sense.²

§ 161. Rule as to contracts which are *ultra vires*.—When a corporation is prohibited from entering into a particular class of contracts, which are therefore illegal, and not simply *ultra vires*, and especially if such contracts have been declared void by the charter or general laws of the State, no action can be maintained upon the prohibited contract, and performance of it may be enjoined by a stockholder or other interested party.³ A distinction has been made be-

¹ COMSTOCK, J., in *Bissell v. Mich. Southern & Northern Ind. R.R. Co.*, 22 N. Y. 258.

² *Green's Brice's Ultra Vires*, 2d Am. Ed. 35.

³ *Smith v. Ala. Life Ins. & Trust Co.*, 4 Ala. 558; *Orr v. Lacey*, 2 Dougl. Mich. 230; *Bank of Chillicothe v. Swayne*, 8 Ohio, 257; *Rutland, etc.*,

R.R. Co. v. Proctor, 29 Vt. 93; *Crocker v. Whitney*, 71 N. Y. 161; *Morris & Essex R.R. Co. v. Sussex R.R. Co.*, 20 N. J. Eq. 542; *Farmers', etc., Bank v. Baldwin*, 23 Minn. 198; *Mathews v. Skinker*, 62 Mo. 329; *City of Memphis v. Memphis Gayoso Gas Co.*, 9 Heisk. 543; *Davis v. Old Colony R.R. Co.*, 131 Mass. 258; *Green v. Seymour*, 3

tween an act of a corporation in violation of an express prohibition in its charter or in some other law relating thereto, and a defect of power in the corporation to do the act when the transaction is not the exercise of a power not

Sandf. Ch. 285; Bangor Boom v. Whiting, 29 Me. 123; Life, etc., Co. v. Manufacturers', etc., Co., 7 Wend. 31; New York, etc., Ins. Co. v. Ely, 5 Conn. 560; Beach v. Fulton Bank, 3 Wend. 573; Albert v. Savings Bank, 1 Md. Ch. Decis. 407; Abbot v. Balt., etc., Co., Ib. 542; Strauss v. Eagle Ins. Co., 5 Ohio St. 59; Bacon v. Miss. Ins. Co., 31 Miss. 116; Bank of Genesee v. Patchin Bank, 13 N. Y. (3 Kern.) 315; Gage v. Newmarket, 18 Q. B. 457; Montgomery v. Montgomery, etc., Plank R. Co., 31 Ala. 76; Chambers v. Falkner, 65 Id. 448. In Downing v. Mt. Washington R. Co., 40 N. H. 230, the court said: "If a corporation attempt to enforce a contract made with it in a case beyond the legitimate limits of its corporate power, that fact being shown will ordinarily constitute a perfect defense. And if a suit is brought upon a contract alleged to be made by a corporation, but which is shown to be beyond its corporate power to enter into, the contract will be regarded as void, and the corporation may avail itself of that defense." See Leavitt v. Palmer, 3 Comst. 19. Contracts contrary to the provisions of a statute are void, though the law does not expressly so declare. Where an excise law did not in terms prohibit the sale of strong or spirituous liquors without a license nor declare the act illegal, but only inflicted a penalty upon the offender, it was held that the thing was unlawful, as it could not be intended that a statute would inflict a penalty for a lawful act. Griffith v. Wells, 3 Denio, 226. It was decided that a foreign incorporated banking company which violated a restraining

act could not recover the amount of a check discounted by it; the court remarking that any contract founded upon an unlawful act, whether it be *malum prohibitum* or *malum in se*, could not be enforced by action. Pennington v. Townsend, 7 Wend. 276. Directors of a corporation cannot waive the provisions of a prohibitory statute forbidding them from participating in the benefits of a contract. Bartow v. Port Jackson, etc., R.R. Co., 17 Barb. 397. In Bissell v. Mich. Southern, etc., R.R. Co., 22 N. Y. 258, it was maintained by COMSTOCK, J., that a contract made by a corporation with an innocent third party, though not authorized by the charter, might be enforced against the corporation under circumstances of controlling equity; while SELDEN, J., held that such a contract was void and could not be enforced by any one. See Taylor v. Chichester & Midhurst R.R. Co., L. R. 2, Exch. 356. "Contracts should be palpably *ultra vires* before they should be held to be void for that reason at the instance of the company as against innocent third persons dealing with it. Corporations should be restricted so far as courts can in the exercise of their powers limit them to the exercise of their legitimate functions. But the plea is not a gracious one that a contract which they have deliberately made, and of which they have received the full benefit, is void for want of power in them to make it. Eminent judges have expressed regret that covenants, entered into deliberately and with fair intentions on both sides, should be resisted on the ground of *ultra vires*, 'a sentiment,' says Lord

conferred on the corporation, but the abuse of a general power in a particular instance.¹ When the act is *ultra vires*, in the sense that it is not within the scope of the powers of the corporation to perform it under any circumstances or for any purpose, the defense is in general available, be-

Campbell, after quoting it from Lord St. Leonards, 'in which we should all concur.'" ALLEN, J., in *Carey v. Cleveland & Toledo R.R. Co.*, 29 Barb. 35. In *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159, the court said: "In the application of the doctrine of *ultra vires*, it is to be borne in mind that it has two phases—one where the public is concerned, one where the question is between the corporate body and the stockholders in it, or between it and its stockholders and third parties dealing with it, and through it with them. When the public is concerned to restrain a corporation within the limits of the power given to it by its charter, an assent by all the stockholders to the use of unauthorized power by the corporate body will be of no avail. When it is a question of the right of a stockholder to restrain the corporate body within its express or incidental powers, the stockholder may in many cases be denied on the ground of his express assent, or his intelligent though tacit consent to the corporate action. If there be a departure from statutory direction which is to be considered merely a breach of trust to be restrained by a stockholder, it is pertinent to consider what has been his conduct in regard thereto. A corporation may do acts which affect the public to its harm, inasmuch as they are *per se* illegal or are *malum prohibitum*. Then no assent of stockholders can validate them. It may do acts not thus illegal, though there is want of power to do them, which affect only the interest of the stockholders. They may be made good by the assent of the stockholders,

so that strangers to the stockholders, dealing in good faith with the corporation, will be protected in a reliance on those acts."

¹ *State Board of Agriculture v. Citizens' Street R.R. Co.*, 47 Ind. 407; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57. In an action by a bank against the drawer and indorser of a bill of exchange payable nine months from date, given to the bank for advances on cotton to be shipped by the bank to a foreign port and sold for the account and at the risk and expense of the owner, and the bill credited with the amount of the net proceeds, adding the difference of exchange, the transaction was held not to be a dealing in goods, wares, or merchandise within the charter of the bank; the phrase, "to deal in," meaning to buy and sell for the owner on commission. *Bates v. Bank of the State*, 2 Ala. 451. In construing the words of prohibition in the charter of the Bank of the United States, which were "to deal or trade in goods, merchandise, or commodities whatsoever," it was held that the correct interpretation of the charter was that it did not prohibit purchases generally, but the buying and selling for the purposes of gain; that it aimed to interdict the bank from doing the ordinary business of a trader or merchant in buying and selling goods for profit, and employed the words "deal" and "trade" in contradistinction to purchases made for the accommodation or use of the bank or resulting from its ordinary banking operations. *Fleckner v. Bank of U. S.*, 8 Wheat. 338.

cause all persons are presumed to know, from the law of the corporate existence, that the corporation has no power to perform the act.¹ But when the act is *ultra vires* with reference to the rights of certain parties without whose consent the corporation is not authorized to perform it, or with reference to some specific purpose when it is not authorized to perform it for that purpose, although within the general powers of the corporation with the consent of the parties interested, or for some other purpose, the defense may or may not be available, depending sometimes upon the question whether the party dealing with the corporation was aware of its intention to perform the act for an unauthorized purpose, or under circumstances not justifying its performance.² While the contracts of a corporation which are entirely foreign to the objects and purposes of its creation are void, contracts in excess of its powers in some particulars may be valid, unless against public policy on account of such excess.³ "The distinction is obvious between a

¹ Franklin Co. v. Lewiston Inst. for Savings, 68 Me. 43; Davis v. Old Colony R.R. Co., 131 Mass. 258; Alexander v. Cauldwell, 83 N. Y. 480; Seligman v. Charlottesville Nat. Bank, 3 Hughes C. C. 647; Mut. Savings Bank v. Meriden Agency Co., 24 Conn. 159. See Abbott v. Balt., etc., Steam Packet Co., 1 Md. Ch. 542; Nat. Trust Co. v. Miller, 33 N. J. Eq. 155; Gunn v. Central R.R. Co., 74 Ga. 509.

² Miners' Ditch Co. v. Zellerbach, 37 Cal. 543; Balliet v. Brown, 103 Pa. St. 546; Sheldon, etc., Co. v. Eickemeyer, etc., Co., 90 N. Y. 607.

³ Germantown Farmers' Mut. Ins. Co. v. Dhein, 43 Wis. 420; Rock River Bank v. Sherwood, 10 Id. 230; Farmers' & Traders' Bank v. Harrison, 57 Mo. 503. "Acts of the officers of a corporation are often said to be *ultra vires* when they are within the scope of the franchise granted in the charter,

but are beyond the authority conferred upon the officers. Such acts, though contrary to the provisions of the charter, if authorized by the stockholders, or acquiesced in or confirmed, cannot be avoided after third persons have acted upon them. They are regulated by the rules which govern the relation of principal and agent to third persons." Hazlehurst v. Savannah, etc., R.R. Co., 43 Ga. 13. In Eastern Counties R.R. Co. v. Hawkes, 5 H. L. Cas. 331, 373, it was said by Lord ST. LEONARDS that he felt disposed "to restrain the doctrine of *ultra vires* to clear cases of excess of power with the knowledge of the other party, express or implied, from the nature of the corporation and of the contract entered into." Difference between exercising powers foreign to corporation, and exercising legitimate powers to an improper extent. Whitman Mining Co. v. Baker, 3 Nevada, 386.

contract by a corporation made in reference to a subject lying entirely without the range of the objects for which its powers were granted, and an irregular or illegal exercise of a right conveyed by its charter. If a corporation make a contract entirely foreign to the purposes of its institution, the act is void simply for want of power in reference to the subject matter. But where a corporation enters into a contract in reference to a subject embraced within the scope of its granted powers, but in so doing exceeds them, the contract will not be rendered void. It might constitute a ground for the resumption of its franchises by the State, but could not be objected to by the party sought to be charged."¹

When corporations are organized under general laws, and are required to file in the office of the secretary of state a certificate showing the purpose for which the corporation is constituted, and all acts of incorporation are therefore deemed public acts, a person who makes a contract with a corporation is bound at his peril to take notice of the limits of its power. There is, however, as we have already said, a distinction between the exercise by a corporation of a power not conferred upon it as declared by the

¹ Haynes v. Covington, 21 Miss. (13 Smed. & Marsh) 408; Littlewort v. Davis, 50 Miss. 403. "In applying the doctrine of *ultra vires* in a particular case, regard must not only be had to the unauthorized agreement or transaction, but also to the relation which the litigating parties sustain to it. Where there is an absolute or total want of power in a corporation to deal in respect to a given subject, it may be that acts done in the name of the corporation in regard to such subject, would, as corporate acts, be void for all purposes, and as against all persons. But there is an obvious distinction between such a case and one where

the corporation deals with a subject within the scope of its granted powers, but for a purpose or in a mode not authorized by its charter. Thus, where property which the corporation under certain circumstances is authorized by its charter to acquire, is purchased in a mode or for a purpose not authorized, it seems clear that the title of the corporation to the property cannot be defeated by a party who is a stranger to the agreement by which the property was acquired and who is not injured by the transfer." Ehrman v. Union Cent. Life Ins. Co., 35 Ohio St. 324. See Memphis v. Memphis Gayoso Gas Co., 9 Heisk. Tenn. 531.

law of its organization, and the abuse of a general power, or the failure to comply with formalities or regulations in a particular instance, when such abuse or failure is not known to the other contracting party.¹ Thus, where a corporation has power to make negotiable promissory notes, such a note is valid in the hands of a *bona fide* holder for value, although made by the corporation as an accommodation note.² But a note given by a corporation prohibited from giving notes, would be voidable, not only in the hands of the original payee, but in those of any subsequent holder; because all persons dealing with the corporation are bound to take notice of the extent of its chartered powers. The same principle is applicable to contracts not negotiable. If the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts resting peculiarly within the knowledge of the corporate officers, the corporation will be estopped from denying that which by assuming to make the contract it had virtually affirmed.³ There

¹ Davis v. Old Colony R.R. Co., *supra*; Zabriskie v. Cleveland, etc., R.R. Co., 23 How. 381.

² Monument Nat. Bank v. Globe Works, 101 Mass. 57. When a corporation has exercised powers incidental to those conferred in furtherance of the general objects of its creation, although the contract may not be within any express right conferred, it will be estopped from denying that it had authority to make the contract. This rule has its foundation in the principles of natural justice which require good faith with third parties dealing with a corporation who have no definite knowledge of the extent of its powers. Chicago Building Soc. v. Crowell, 65 Ill. 453.

³ Bissell v. Mich. South., etc., R.R. Co., 22 N. Y. 289, 290; per SELDEN, J.; City of Lexington v. Butler, 14

Wall. 282; Smead v. Indianapolis, etc., R.R. Co., 11 Ind. 104. "The logic of the law, and certainly its morality, are not opposed to the doctrine that the legislature may prohibit the contract and punish the guilty parties, and yet leave the contract to stand in favor of innocent persons not included in the terms of the prohibition." COMSTOCK, Ch. J., in Oneida Bank v. Ontario Bank, 21 N. Y. 490. A contract with a corporation may be binding on the parties, though it was an abuse of the corporate powers for which the corporation is answerable to the government which created it. Bank of South Car. v. Hammond, 1 Rich. 288; Southern Life Ins. & Trust Co. v. Lanier, 5 Fla. 110. Where a banking corporation, created by an act of the legislature of the State of Pennsylvania, having taken a mortgage on land in the State of

is an important difference with respect to the application of the doctrine of *ultra vires* in the case of contracts which are purely executory, and where contracts have been fully or even partially executed. The first mentioned contracts, if *ultra vires*, will not be enforced where no wrong will be done by leaving the parties in their previous situation. But the executed dealings of a corporation will be allowed to stand for and against both of the parties when the plainest rules of good faith so require.¹

New York, to secure a loan of money made at their bank in the former State, it was objected that as the charter only authorized the bank to take mortgages for debts previously contracted, it had no right to take a mortgage concurrently with the loan, Chancellor KENT said: "If this objection were strictly true in point of fact, I should not readily be disposed to listen to it. Perhaps it would be sufficient for this case that the plaintiffs are a duly incorporated body, with authority to contract and take mortgages and judgments, and if they should pass the exact line of their power, it would rather belong to the government of Pennsylvania to exact a forfeiture of their charter, than for the court in this collateral way to decide a question of misuser by setting aside a just and *bona fide* contract." *Silver Lake Bank v. North*, 4 Johns. Ch. 370. A bank was authorized by its charter to purchase, hold, and convey real estate as follows: Such as should be necessary for its immediate accommodation in the convenient transaction of its business; such as should be mortgaged to it as security for loans; such as should be conveyed to it in satisfaction of debts previously contracted in the course of its dealings; such as it should purchase at sales under judgments, decrees, or mortgages held by it. The bank acquired a small lot of land in a village from the holder

of a sheriff's certificate of sale on execution. The consideration expressed in the assignment was "for value received." It was held that these words might be referred with equal propriety to a present value paid down, or to a debt previously existing, in satisfaction of which the assignment was made; or they might include value of any description; that although the bank had no general authority to deal in real estate, but could take and hold land only for specified purposes and for specified considerations, yet as the terms of the conveyance were consistent with the powers thus granted, the presumption was in favor of the title of the bank, because there was nothing to impeach it. *Chautauqua Co. Bank v. Risley*, 19 N. Y. 369; S. C. 4 Denio, 480. - And see *Same v. White*, 2 Seld. 236.

¹ *Parish v. Wheeler*, 22 N. Y. 494; *Argenti v. San Francisco*, 16 Cal. 255. It has been held that if the parties be *in pari delicto*, and the contract be executed, they are without remedy; but that although the contract be executed, yet if the parties be not *in pari delicto*, the claims of justice of the less guilty party will be reconciled with the claims of public policy; that where a corporation, having power to do certain things, exceeds its power, and parties dealing with it have no knowledge that its conduct is unlawful, the corporation will be decreed to pay debts contracted in

When the question is merely as to the power to contract in the particular instance, a party who has had the benefit of the contract should not be permitted, especially when no unlawful intent is charged upon the other party, to question its validity.¹ In other words, the doctrine of *ultra vires* ought not to be allowed to prevail where it would defeat the ends of justice, and work a legal wrong.² "The rule seems well established, that if a contract has been executed

furtherance of its unlawful pursuit. Ohio Life Ins. & Trust Co. v. Merchants' Ins. & Trust Co., 11 Humph. 1.

¹ See *De Groff v. Am. Linen Thread Co.*, 21 N. Y. 124; *S. C.* 24 Barb. 375; *Hitchcock v. Galveston*, 96 U. S. 341; *State Board of Agriculture v. Citizens' Street R.R. Co.*, 47 Ind. 407; *Gold Mining Co. v. Nat. Bank*, 96 U. S. 640; *Steam Nav. Co. v. Weed*, 17 Barb. 378; *Buffett v. Troy and Boston R.R. Co.*, 40 N. Y. 168; *Alleghany City v. McClurkan*, 14 Pa. St. 81; *City of Natchez v. Mallory*, 54 Miss. 499; *Underwood v. Newport Lyceum*, 5 B. Mon. 129. "Where corporations have exercised powers incidental to those conferred, and in furtherance of the general objects of the corporation, although the subject of the contract may not be within any express right conferred, they will be estopped from denying that they had authority to make such contracts. Good faith to third parties who deal with such corporations, and who may have no accurate knowledge of the extent of their powers under their charters, requires the adoption of this salutary rule. The rule has its foundation in the plainest principles of natural justice. When such corporations have received the benefit of a contract, if there is nothing in it contrary to public policy, there can be no just reason why they should not be required to enforce it." *Chicago Building Soc. v. Crowell*, 55 Ill. 417. See

State of Indiana v. Woram, 6 Hill, 37; *Moss v. Rossie Lead Mining Co.*, 5 Id. 137; *Potter v. Bank of Ithaca*, Ibid. 490; *Suydam v. Morris Canal & Banking Co.*, Ibid. 491, *note*; *Sackets Harbor Bank v. Lewis County Bank*, 11 Barb. 213; *Chester Glass Co. v. Dewey*, 16 Mass. 102; *McCutcheon v. Steamboat Co.*, 13 Pa. St. 13; *Palmer v. Lawrence*, 3 Sandf. 170. Where certain landowners entered into a contract with a railroad company, that in consideration that the former obtained from the admiralty a waiver of an obligation imposed upon the company by its act to construct certain works, and upon conveyance by the landowners of the necessary land, the company would make a carriage road between specified points, and also make and maintain a wharf of stipulated dimensions for loading and discharging vessels, and the landowners fulfilled the agreement on their part, it was held on a bill for specific performance that the contract was not *ultra vires*, and that it might be enforced against the company. *Wilson v. Furniss R.R. Co.*, L. R. 9, Eq. 28. See *Storer v. Gt. Western R.R. Co.*, 2 Younge & Collier, Ch. (21 Eng. Ch.) 48.

² *Darst v. Gale*, 83 Ill. 136; *Railway Co. v. McCarthy*, 96 U. S. 258; *San Antonio v. Mehaffy*, Ibid. 312; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Camden & Atlantic R.R. Co. v. May's Landing, etc.*, R.R. Co., 48 N. J. 530.

and fully performed on the part either of the corporation or of the other contracting party, neither will be permitted to insist that the contract and such performance by one party were not within the corporate power of the company.”¹ Therefore, when a corporation has entered into a contract which has been fully executed on the other part, and nothing remains but the payment by the corporation of the consideration, it will not be allowed to set up that the contract was *ultra vires*.² It has been held that a corporation cannot avoid the repayment of borrowed money, or payment for labor and money expended in behalf of the corporation, on the ground that, while it had power to employ the money and labor, it did so in order to carry on business which it was not authorized to prosecute, even if the other party was aware of the fact, provided the business itself was free from any intrinsic immorality or illegality.³ “Corporations,” says the court, in *Converse v. Norwich, etc., Co.*,⁴ “have, within a few years, under general laws, become so numerous, and are so connected with and so control the business of the country, and even its religious and benevolent agencies, that the courts have gradually come to think it necessary to relax the technical and theoretical strictness of the legal principles applicable to them, and subject them to the same liabilities for the acts of their agents as natural persons, so far as it can be done practically and consistently with their charters.” The charter of a telegraph company contained a proviso that the lines of the company should be open for sending and receiving dispatches to all persons alike, without favor or preference, subject to such equitable charges and such reasonable regu-

¹ *Hayes v. Galion Gas Co.*, 29 Ohio St. 330; *Union Mining Co. v. Rocky Mt. Nat. Bank*, 2 Col. 256; *Attleborough Nat. Bank v. Rogers*, 125 Mass. 339.

² *Oil Creek, etc., R.R. Co. v. Pa. Trans. Co.*, 83 Pa. St. 160.

³ *Bradley v. Ballard*, 55 Ill. 413; *Gas Co. v. San Francisco*, 9 Cal. 453; *Tracy v. Talmage*, 14 N. Y. 162; *Gould v. Oneonta*, 3 Hun, 401.

⁴ 33 Conn. 166.

lations as might from time to time be made by the company. The company having entered into a contract with the plaintiff to transmit his messages for half price, in consideration that the plaintiff would send all of his own messages by their line, and collect public intelligence and bring custom to the company, Lord CAMPBELL, Ch. J., doubted whether, although the proviso in the charter might be made the foundation for complaints against the company, it could be available to them in resisting a demand under the contract into which they had entered, but said that the allowance to the plaintiff seemed rather a remuneration to him for his services, than any preference or partiality, and it had not been shown that the dealings of the company with the plaintiff were not according to equitable charges and reasonable regulations.¹ It was said by the court with reference to a contract entered into by a railroad company: "Though the company might have had no special authority by their charter to make such contracts, and could perhaps have been enjoined or restrained from doing it by proper proceedings, they could not plead such want of authority against persons so contracting with them. To do so, would be taking advantage of their own wrong."² The same principle has been held applicable to an individual attempting to screen himself from liability when contracting with a corporation. Thus, where a license to fill up a watercourse was obtained from a corporation in consideration that the licensee would reopen and restore the watercourse when requested, it was held, in a suit against the licensee for a breach of his promise, that he was estopped from setting up that the ownership and maintenance of the watercourse by the corporation were *ultra vires*.³ Where it appeared that a railroad

¹ Reuter v. Electric Telegraph Co., 37 Eng. L. & Eq. 189.

² Perkins v. Portland, etc., R.R. Co., 47 Me. 573.

³ Hamilton, etc., Hydraulic Co. v. C. H. & D. R.R. Co., 29 Ohio St. 341. See So. Life Ins. Co. v. Lanier, 5 Fla. 110. "It ill becomes the defendants

company, without authority, purchased and paid for a steamboat and several canal-boats, that being in the possession and use of the property in connection with its regular business, it mortgaged the property to its creditor, taking back a charter party and stipulation for a reconveyance if the debt should be paid at the time agreed; and that the creditor caused a part of the property to be sold after default, and received the proceeds of sale; it was held that neither the company nor the creditor could object that the transaction was *ultra vires* on the part of the company.¹ The acts of a corporation which are not *per se* illegal, or *malum prohibitum*, but which are *ultra vires*, affecting, however, only the interests of the stockholders, may be made good by the assent of the stockholders, so that strangers to them, dealing in good faith with the corporation, will be protected in relying on these acts.² Several of the cases hold that where the contract, being *ultra vires*, no action can, for that reason, be maintained on the contract, a party may recover the value of the property delivered, or the consideration paid, the parties not being *in pari delicto*.³ "Why should not a corporation be always liable to

to borrow from the plaintiff \$1,000 for a single day to relieve their immediate necessities, and then turn around and say, we will not return you this money, because you had no power by your charter to lend it. Let them first restore the money, and then it will be time enough for them to discuss with the sovereign power of the State of Connecticut the extent of the plaintiff's chartered privileges." PARKER, J., in *Steam Nav. Co. v. Weed*, 17 Barb. 378.

¹ *Parish v. Wheeler*, 22 N. Y. 494. See *Pierce v. Emery*, 32 N. H. 484.

² *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159; *Sheldon Hat Blocking Co. v. Eickemeyer*, 90 Id. 607.

³ *Maryland Hospital v. Foreman*, 29 Md. 524; *Allen v. Freedman's Savings*,

etc., Co., 14 Fla. 418. "When money has been paid upon an executory agreement which is free from moral turpitude, and is not prohibited by positive law, but which is invalid by reason of the legal incapacity of a party thereto, otherwise capable of contracting, to enter into the particular agreement, or for want of compliance with some formal requirement of the law (as that a contract shall be in writing and the like), the money so paid may, while the agreement remains executory, be recovered back by the party paying it." *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655. See *Salamons v. Laing*, 12 Beav. 377; *Atty. Genl. v. Dangars*, 33 Id. 621; *Russell v. Wakefield Waterworks Co.*, L. R. 20, Eq.

refund the money or property of a person which it has obtained improperly and without consideration, or, if unable to return it, to pay for the benefit obtained thereby? To say that a corporation cannot sue or be sued upon an *ultra vires* arrangement is one thing. To say that it may retain the proceeds thereof which have come into its possession, without making any compensation whatever to the person from whom it has obtained them, is something very different, and savors very much of an inducement to fraud.”¹ On the other hand, a person who has obtained corporate property or funds in an *ultra vires* transaction, “has obtained what the parties dealing with him had no power, no authority, to alienate. It belongs to the corporation, not to him. Therefore, as in every other case of a person obtaining, however *bona fide*, that which belongs to another, such person must make restoration, in specie or in value, it

474; Ossipee, etc., *Manf. Co. v. Canney*, 54 N. H. 295; *Phila. Loan Co. v. Turner*, 13 Conn. 249; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62. Where the illegal object of the corporation was in the contemplation of both parties, and formed a part of the original contract, both are of course *in pari delicto*.

¹ Green's *Brice's Ultra Vires*, 2d Am. Ed. 721. “Though a corporation cannot be sued, any more than any other citizen, directly upon a contract or analogous transaction which does not bind it, yet if it sets up this defense, it must restore to the other party what it has obtained from him. It may repudiate the transaction if it chooses, but if so, it must repudiate altogether; it cannot reprobate and approbate; it cannot keep what in another form it has rejected. *Ib.* 717. See *Casey v. La Societe, etc.*, 2 Woods, 77. While courts are inclined to maintain with rigor the limitation of corporate action whenever it is a question of restrain-

ing the corporation in advance from passing beyond the boundaries of their charters, they are equally inclined, on the other hand, to enforce against them contracts, though *ultra vires*, of which they have received the benefit. *Bradley v. Ballard*, 55 Ill. 413; *Darst v. Gale*, 83 Id. 136; *Chippendale, ex parte*, 4 De G. M. & G. 19. When the charter of an insurance company provides that policies shall be attested in a particular mode, if a policy happen to be defectively attested, and therefore worthless to the insured, it would not be a defense to the repayment of the premium; and a contract of a bank for a loan of money, though incapable of being enforced because not signed by the cashier, pursuant to the act, would not prevent the party loaning the money from recovering it back. *Boisgerard v. N. Y. Banking Co.*, 2 Sandf. Ch. 25. The payment of a just claim by a corporation, though not made as required upon a formal order of the board of directors, cannot be recovered back. *New*

seems necessarily to follow that restoration must similarly be made when the alienation was *ultra vires*.”¹

Mr. Brice² lays down, in substance, the following propositions indicating the chief cardinal principles of the doctrine of *ultra vires*: 1. A corporation has all the capacities for engaging in transactions which are expressly given it by the constating instruments. This, of course, is but what the common law lays down; 2. A corporation has all the capacities for engaging in transactions which are impliedly given it by reasonable implication from the language of the constating instruments. The difficulty consists in determining what these implied capacities are; 3. A corporation has all the capacities or powers for management which are given it by its constating instruments, either expressly or by reasonable inference therefrom. Questions of management are of frequent occurrence and of great practical importance; 4. Capacities or powers for management may be given by wide general language; 5. Corporations have no capacities or powers other than those indicated in the four previous propositions, and they cannot legally or validly engage in other transactions; 6. Courts, in dealing with corporations, will look to those capacities and powers only which they actually possess at the time; 7. Corporations cannot be rendered directly liable upon *ultra vires* transactions, but must account for benefits received therefrom. As long as the transaction remains executory, it cannot be enforced; 8. Special proceedings, in themselves *ultra vires*, will sometimes be upheld as having been rendered necessary by unexpected circumstances; 9. Formali-

Orleans Building Co. v. Lawson, 11 La. O. S. 34.

¹ Green's Brice's Ultra Vires, 2d Am. Ed. 658; Whitney Arms Co. v. Barlow, 63 N. Y. 62; Hall Manf. Co. v. American, etc., Supply Co., 48 Mich. 331; Oil Creek, etc., R.R. Co. v. Pennsylvania Transp. Co., 83 Pa. St. 160; Union

Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 621; Nat. Bank v. Whitney, 103 U. S. 99; Union Nat. Bank v. Hunt, 76 Mo. 439; Kelly v. People's Transp. Co., 3 Oregon, 189.

² Green's Ultra Vires, part. 2, ch. 1, sec. 4, 2d Am. Ed., p. 41 *et seq.*

ties are generally not imperative, but merely directory, and therefore the absence of them can be set up against those persons only who were cognizant of the defect. The cautions here requisite, are to separate mere formalities from powers and capacities, and to remember that formalities may be essential and imperative, and if so, they must be duly observed; 10. Franchises and special privileges or powers in the nature of franchises, cannot be delegated. Every capacity of a corporation which can be styled special or a privilege, is given to it for itself, for its own purposes, and to be used by itself directly. Any transfer direct or indirect to others, is altogether void; 11. Special powers, of whatever description, can be used only *bona fide* for the purposes for which created; 12. The capacities and powers of the governing body, and *a fortiori* those of the subordinate agents of a corporation, cannot be greater, and will generally be more restricted than those of the corporation; 13. Any party to an *ultra vires* transaction may set up the defense thereof, and one corporator may call upon the courts to restrain the corporation from engaging therein.

§ 162. **Contract of directors or officers for their own benefit.**—The directors have sometimes been spoken of as the trustees, and the stockholders as the *cestuis que trust*. Although directors are not, strictly speaking, trustees, that is, persons having the legal title to property, the beneficial ownership of which belongs to others, yet they occupy a fiduciary position toward stockholders and creditors, and are clothed with important and extensive powers upon the trust and confidence that they will discharge their duties in good faith for the common benefit of the shareholders. A director cannot therefore lawfully, as such, make an agreement in which he has a personal interest adverse to the interests of the corporation, whether he enters into the contract in its inception, or acquires an interest in it after-

ward.¹ It is among the rudiments of the law that the same person cannot act for himself, and at the same time with respect to the same matter as the agent of another whose interests are conflicting. Thus a person cannot be

¹ Wood v. Dummer, 3 Mason, 308; Jackson v. Ludeling, 21 Wall. 616; Thomas v. Brownsville, Fort Kearney, etc., R.R. Co., 1 McCrary, 392; West St. Louis Sav. Bank v. Shawnee County Bank, 3 Dillon, 403; 95 U. S. 557; Cook v. Sherman, 20 Fed. Rep. 167; Hoffman Steam Coal Co. v. Cumberland Coal, etc., Co., 16 Md. 456; Cumberland Coal Co. v. Sherman, 30 Barb. 555; Same v. Parish, 42 Md. 598; Jones v. Morrison, 31 Minn. 140; Koehler v. Black River Falls Co., 2 Black. 715; Peabody v. Flint, 6 Allen, 52; Parker v. Nickerson, 137 Mass. 487; Richards v. New Hampshire Ins. Co., 43 N. H. 263; Hodges v. N. E. Screw Co., 1 R. I. 312; Bliss v. Matteson, 45 N. Y. 22; Butts v. Wood, 37 Id. 317; Coleman v. Second Av. R.R. Co., 38 Id. 201; Blake v. Buffalo Creek R.R. Co., 56 Id. 485; Heath v. Erie R.R. Co., 8 Blatchf. 347; Covington, etc., R.R. Co. v. Bowler, 9 Bush. Ky. 468; United Soc. of Shakers v. Underwood, Ib. 609; Goodin v. Cincinnati, etc., Canal Co., 18 Ohio St. 169; Hale v. Bridge Co., 8 Kansas, 466; Bryan v. Leavenworth, etc., R.R. Co., 21 Id. 365; Flint, etc., R.R. Co. v. Dewey, 14 Mich. 477; Gallery v. Nat. Exchange Bank, 41 Id. 169; Guild v. Parker, 43 N. J. 430; Redmond v. Dickerson, 9 N. J. Eq. (1 Stockton) 507; Gardner v. Butler, 30 Id. 702; McDowell v. Mech. & Agr. Co., 38 Ark. 17; Alford v. Miller, 32 Conn. 543; Port v. Russell, 36 Ind. 60; McAleer v. McMurray, 58 Pa. St. 126; Simons v. Vulcan Oil, etc., Co., 61 Id. 202; Rice's Appeal, 79 Id. 168; First Nat. Bank v. Gifford, 47 Iowa, 575; Blair Town Lot, etc., Co. v. Walker, 50 Id. 376; San Diego

v. San Diego, etc., R.R. Co., 44 Cal. 106; Farmers' & Merchants' Bank v. Downey, 53 Id. 466; Davis v. Rock Creek, etc., Mining Co., 55 Id. 359; Hoyle v. Plattsburgh, etc., R.R. Co., 54 N. Y. 314; Abbott v. Am. Hard Rubber Co., 33 Barb. 578; Inglehart v. Thousand Island Hotel Co., 32 Hun, 377; Bank v. Flour Co., 41 Ohio St. 552; Hopson v. Aetna Axle & Spring Co., 50 Conn. 597; European & N. Am. R.R. Co. v. Poor, 59 Me. 277; Ashurst's Appeal, 60 Pa. St. 291; Cook v. Berlin Woolen Mill Co., 43 Wis. 433; Levisse v. Shreveport City R.R. Co., 27 La Ann. 641; Paine v. Lake Erie, etc., R.R. Co., 31 Ind. 283; Stewart v. Lehigh Valley R.R. Co., 38 N. J. 505; Harris v. North Devon R.R. Co., 20 Beav. 384. In Coal and Iron Co. v. Sherman, 30 Barb. 553, the court said: "Those who assume the position of directors and trustees, assume also the obligations which the law imposes on such a relation. The stockholders confide to their integrity, to their faithfulness, and to their watchfulness, the protection of their interests. This duty they have assumed, this the law imposes upon them, and this those for whom they act have a right to expect. The principals are not present to watch over their own interests; they cannot speak in their own behalf; they must trust to the fidelity of their agents. If they discharge these important duties and trusts faithfully, the law interposes its shield for their protection and defense; if they depart from the line of their duty, and waste, or take to themselves instead of protecting the property and interests confided to them, the law, on the application of those thus wronged

a purchaser of property and at the same time the agent of the vendor. The two positions impose different obligations, and their union would at once raise a conflict between interest and duty; and, constituted as humanity is, in the majority of cases duty would be overborne in the struggle. The law therefore will always condemn the transactions of a party on his own behalf when, in respect to the matter concerned, he is the agent of others, and will relieve against them whenever their enforcement is seasonably resisted. Directors of corporations, and all persons who stand in a fiduciary relation to other parties and are clothed with power to act for them, are subject to this rule; they are not permitted to occupy a position which will conflict with the interest of parties they represent and are bound to protect. They cannot, as agents or trustees, enter into or authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits.¹ The rule was tersely stated by the court in a case in Wisconsin thus: "We think there is a fatal objection to the plaintiff's right to maintain this action which renders it unnecessary to consider any of the other questions discussed. That is, that inasmuch as it appears that the plaintiff was himself the director of the district at the time the contract was let, and took part as such in the proceedings to let it, it was against public policy to allow him, while holding that fiduciary relation to the district, to place himself in an antagonistic position, and obtain the contract for himself from the board of which he was a

or despoiled, promptly steps in to apply the corrective, and restores to the injured what has been lost by the unfaithfulness of the agent. . . . Neither are the duties or obligations of a director or trustee altered from the circumstance that he is one of a number of directors or trustees, and that this circumstance diminishes his responsi-

bility, or relieves him from any incapacity to deal with the property of his *cestui que trust*." See *Barton v. Port Jackson, etc., Plank R. Co.*, 17 Barb. 397.

¹ *Wardell v. Union Pacific R.R. Co.*, 4 Dillon, 330; 103 U. S. 651, per FIELD, J. See *Marsh v. Whitmore*, 21 Wall. 178.

member.”¹ In *Aberdeen R.R. Co. v. Blackie*,² the House of Lords, reversing the judgment of the court below, held that a contract entered into by a manufacturer for the supply of iron furnishings to a railroad company of which he was a director at the date of the contract, was invalid. Lord CRANWORTH, in delivering the opinion of the court, said: “A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character toward his principal; and it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in

¹ *Pickett v. School Dist. No. 1*, 25 Wis. 552. A railroad company agreed in writing under seal, to give A. a lease for ninety-nine years of the hotel to be built at X. Station, the company to have the right to determine the lease if any complaint as to the mode of conducting the business should not be remedied within three months after notice of such complaint. It was also agreed that the lessees should have the occupation of the refreshment-rooms at X. Station, subject to the same restrictions and provisions as related to carrying on the business of the hotel, both as regarded the quality and prices of provisions, and management. The lease executed pursuant to the foregoing provisions was confined to the hotel, and contained no mention of the refreshment-rooms. The refreshment-rooms on the up line adjoining the hotel had always been occupied with it. B., a director of the company (head of a firm at X. who were assignees of the lease of the hotel), erected at a cost of £200, refreshment-rooms on the down-town line, pursuant to an alleged agreement with the company that his firm should have a lease of such refreshment-

rooms for a term coextensive with the lease of the hotel. The only evidence of such agreement was the following entry in the books of the company: “A ground rent of £6 per annum was ordered to be fixed for the new refreshment-rooms built by the lessees at the down-town station in X.” The company gave notice to C., the assignee of B., of the lease, and occupier of both refreshment-rooms, that their arrangements with reference to a new station at X. would require the termination of his tenancy of the refreshment-rooms. It was held that with reference to the refreshment-rooms on the down line, no agreement had been shown which could be enforced, especially as the transaction was between a director and the company for the benefit of himself or his firm; but that, as to the upper refreshment-rooms, C. was entitled to have the agreement carried out by having a deed executed to him granting the right of occupation by him, his assigns and nominees, being tenants of the hotel, subject to the provisions and restrictions of the agreement. *Flanagan v. Gt. Western R.R. Co.*, L. R. 7, Eq. 116.

² 1 Macq. 461.

which he has, or can have, any personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of the contract so entered into. It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract may have been the best for the *cestui que trust* which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt, or attempted to deal, with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person; they may even at the time have been better. But still, so inflexible is the rule, that no inquiry on that subject is permitted. The English authorities on this subject are numerous and uniform."

The rule under consideration is of course as applicable to corporate officers as to subordinate agents.¹ In *Gt. Luxembourg R.R. Co. v. Magnay*,² where the defendant, who was president of the company, was furnished with the money to buy for the company the concession of another line, and bought it from himself, he being the concealed owner of it, the Master of the Rolls said: "I proceed to explain what I mean by the proposition that an agent or trustee cannot retain any benefit for himself from such a transaction. Suppose a company desired to buy an estate, and the trustee undertook to buy it for them, concealing the fact that it was his own estate, and if he then sells it to the company of which he is a director for double its value, the court would not allow the transaction to stand. It would say to the company, You must repudiate the bargain altogether, or you may adopt it if you think fit; but if,

¹ *West St. Louis Bank v. Shawnee County Bank*, 3 Dillon, 403; *Chamberlain v. Pacific Wool Growing Co.*, 54 Cal. 103; *Rhodes v. Webb*, 24 Minn. 292; *First Nat. Bank v. Gifford*, 47 Iowa, 575.
² 25 Beav. 586.

from any circumstance whatsoever, it becomes impossible to return the estate, all that the trustee would be entitled to would be the full value of the estate sold; but when it is said that he cannot make any profit by the transaction, it is not meant that he is not to have the proper value of the property which is actually taken by the company." "The same principle must apply, whether it is property conveyed or services rendered to the company. The cupidity and avarice of the trustee is guarded against by giving the *cestui que trust* the right to repudiate the contract at all times where it is executory, and to allow simply a just remuneration, without reference to the contract price, where it is executed. The trustee thus derives no advantage from his breach of duty, and the company can suffer no detriment from his service in their behalf."¹ B., the president of a railroad company, having been appointed its general agent, with a general power of supervision and direction, and with authority to do all necessary and proper acts for conducting the business of the company, subject to such regulations as from time to time should be adopted by the board of directors, he and C., the treasurer of the company, purchased land of S., in order to obtain gravel for the road. By the original contract of purchase, the company was to pay eighty-eight dollars in cash, and secure the balance of the purchase money by its notes and a mortgage; but for reasons personal to the grantor, this mode was abandoned, and B. and C. gave their note for the balance, and the conveyance was made to them. The company paid the

¹ Gardner v. Butler, 30 N. J. Eq. (3 Stewart) 702, per VAN SYCKEL, J. Where the president and two directors of a railroad company, after making a contract with an improvement company to build and equip the road, became stockholders in that company, with the expectation of personal gains, it was held that, although no fraud in

fact might not have been intended, and the transaction might have been to the advantage of the railroad company, yet it was a breach of duty to the stockholders, and any one interested would be entitled to have an account of the gains and profits. Gilman, Clinton, etc., R.R. Co. v. Kelly, 77 Ill. 426.

eighty-eight dollars, and also interest on the note, from its funds in the charge of C. as its treasurer, and the payments were so entered on its books. The gravel having been taken by the company at its own expense, B. and C. sold so much of the land as was not required for the company's use, and with the proceeds paid the note, leaving a balance of several hundred dollars. It was held that B. and C. were agents and trustees of the company in the purchase and sale of the land, and that the company was entitled to a conveyance from them of the land remaining unsold, and payment of the avails of the sale remaining in their hands.¹

A contract was made between a railroad company and a firm of individuals, by which the latter undertook the construction and equipment of the road. While engaged upon this work, the members of the firm, together with the president of the company, one of its directors, and its construction agent, entered into a contract with Wathen and Gibson, who owned one hundred and sixty acres of land, situated where the road then being constructed was expected to cross the Illinois Central Railroad, agreeing to sell to the first-named parties an undivided half of the land, as follows: No money was to be paid to the purchasers, but the land was to be laid out into town lots, and sold. The first proceeds of the sale to the amount of \$4,800, were to be retained by Wathen and Gibson, the owners, and they were then to convey to the other parties an undivided half of the rest of the land. The only consideration for the contract was that the purchasers should aid, assist, and contribute to the building up of a town on the land. Wathen and Gibson laid out the land in lots, and proceeded to sell, and the town was built. On a bill filed against Wathen and Gibson for specific performance, the court said: "A court of equity will not enforce a contract rest-

¹ Church v. Sterling, 16 Conn. 388.

ing upon such official delinquency, or even tending to produce it. Such is the character of the contract before us. If we enforce it, we lend the sanction of the court to a class of contracts the inevitable tendency of which is to make the officers of these powerful corporations pervert their trusts to their private gain, at the price of injury at once to the stockholders and to the public. Rendered into plain English, the contract in this case was a bribe on the part of Wathen and Gibson to the president and other officers of the railway company, and to the contractors who were building the road, of an undivided half of one hundred and sixty acres of land, in consideration of which the road was to be constructed on a certain line, and a depot built at a certain point. Now, if this was the best line for crossing the Illinois Central, considered with reference to the interests of the stockholders and of the public, then it was the duty of the company to establish it there; and if they intended so to do because it was the proper line, but professed to be hesitating between this and another line, in order to secure for themselves the contract under consideration, as is somewhat indicated by the evidence, then they were practicing a species of fraud upon the defendants, and using a false pretext in order to acquire the defendants' property without consideration. If, on the other hand, this line was not the best, but was adopted because of this contract, the case is still stronger against complainants. If such was the fact, they are asking the court to enforce the payment of a bribe, the promise of which induced them to sacrifice their official duty to their private gain. If, as a third contingency, the choice lay between this line and another equally good, but not better, and they were influenced by this contract to adopt this line, then, although neither the company nor the public has been injured, yet the defendants have made their official power an instrument of private emolument in a manner which no court of equity

can sanction. In this particular case, no wrong may have been done, and yet public policy plainly forbids the sanction of such contracts because of the great temptation they would offer to official faithlessness and corruption.”¹

The principle of public policy which forbids transactions of officers or directors in relation to corporate affairs in which their interests conflict with their duties to the corporation, has been applied to the case of a member. In an action on an agreement made in consideration of services rendered in procuring the location of a depot, it appeared that a contract was entered into between A. and B., which recited that A. was the owner of land which would be increased in value if a railroad company named should establish its depot on the land, and that, in order to induce the company to do so, it would be necessary to form a joint stock company to purchase the land and give a portion of it to the railroad company for its depot, and that B. had agreed to aid in getting up such a joint stock company, and in causing the railroad company to locate its depot on the land, it being understood that he was of the opinion that the railroad company, with a view to the public good and the interests of stockholders, ought to have its depot there; and A. agreed to pay B. a sum of money so soon as the depot should be located on the land. A joint stock company was accordingly formed and incorporated, with power to purchase and hold the land, and to give a portion of it to the railroad company as an inducement to establish its depot thereon, and an agreement was made between the two corporations by which the depot was thus located. B. was a member of the railroad company when he made the agreement with A., and subsequently became a member of the joint stock company. SHAW, C. J., in delivering the opinion of the court, said: “Without considering the aspects of the contract, we are of opinion that it was con-

¹ Bestor v. Wathen, 60 Ill. 138, per LAWRENCE, C. J.

trary to public policy and to upright and fair dealing, as it tended to injuriously affect the public interest in establishing the fittest and most suitable location for the termination of the railroad for the accommodation of public travel ; 2d, as it affects the interests of the proprietors of the railroad ; 3d, as it affected the interests of the joint stock company. The railroad was established for the public accommodation and convenience in the transportation of passengers and merchandise. Like a country road, it was in many respects a common highway. It may be said that it was to be constructed and located by the corporation. True, as in the case of a turnpike road, it is constructed in the first instance at the expense of a private company of adventurers, and they are to be reimbursed by a toll levied and regulated by law for their remuneration. The work is not the less a public work, and the public accommodation is the ultimate object. It is also true that it was left to the corporation and directors to fix the termination and place of deposit. In doing this, a confidence was reposed in them acting as agents for the public,—a confidence which it seems could be safely so reposed, when it is considered that the interests of the corporation as a company of passenger and freight carriers for profit was identical with the interests of those who were to be carried, and had goods to be carried,—that is, with the public interest. This confidence, however, could only be safely so reposed under the belief that all the directors and members of the company should exercise their best and their unbiased judgment upon the question of such fitness without being influenced by distinct and extraneous interests having no connection with the accommodation of the public or interests of the company. Any attempt, therefore, to bring into efficient operation such undue influence, has all the injurious effects of a fraud upon the public by causing a question which ought to be decided with a sole and single regard to public interests to be affect-

ed and controlled by considerations having no regard to such interests." ¹

The directors cannot lawfully benefit or favor any particular shareholder, or class of shareholders. Every authority possessed by them is a power, and discretion in the directors, who are trustees for the benefit of all of the shareholders, which is to be exercised for the benefit of all of them.² The directors of a joint stock bank passed a resolution to increase the capital to a certain sum by new £50 shares, which were to be offered to the old shareholders at the rate of one new share for each old share held by them, upon the payment for each share of £25 premium, and £5 as a first call. The shares not taken up by them were to be disposed of by the directors at £30 premium. The directors entered into an arrangement with S., by which he was to take at £30 premium all of the shares not taken up by the old shareholders. A large number of shares were accordingly allotted to S., who paid only £5 per share, it being arranged that the certificate for these shares should be withheld, that the bank should have a lien on them for the premiums, and that no transfer from him to any purchaser should be registered until the £30 per share on the shares transferred had been paid. S., being unable to take up so many shares, applied to four of the directors to relieve him of some of them, and they severally took from him a large number at £30 per share, and afterward disposed of them at a profit. It was held by the appellate court affirming the decision of the vice-chancellor, that the four directors must account to the bank for the profits made by them in the sale of the shares.³

There is an exception to the rule which precludes a director from entering into contracts with the corporation, or

¹ *Fuller v. Dame*, 18 Pick. 472.

² *Gas Light Improvement Co. v.*

³ *Harris v. North Devon R.R. Co.*, Terrell, L. R. 10, Eq. 168. Compare Adamson's Case, L. R. 18, Eq. 670.

from being interested in contracts made between the corporation and third persons, when there is a full disclosure by him of the nature and extent of his interest,¹ so as to enable his co-directors to make an exact estimate of the profits accruing or likely to accrue to the director from the transaction.² Where certain directors were interested in a contract made with the corporation, it was said by the court that "nothing short of a ratification by the board after a full explanation and knowledge of their interest and all of the circumstances, could render such a contract binding upon the corporation."³

§ 163. In what manner a corporation may contract.—Primarily the corporate will or assent must be expressed by a majority of the members, whose act is deemed the act of the whole, and who, therefore, for most purposes, not

¹ York & North Midland R.R. Co. v. Hudson, 16 Beav. 481; Bank of London v. Tyrell, 10 H. L. Cas. 26; 31 L. J. Ch. 369; Imperial Mercantile Credit Assoc. v. Coleman, 6 H. L. Cas. 189.

² Green's Brice's Ultra Vires, 2d Am. Ed., 481, 482; Twin Lick Oil Co. v. Marbury, 91 U. S. 587; Buell v. Buckingham & Co., 16 Iowa, 284; Jones v. Arkansas Mech., etc., Co., 38 Ark. 17; Bank v. Flour Co., 41 Ohio St. 552. A director or stockholder may trade with or borrow from or loan money to the company of which he is a member, on the same terms and in like manner as other persons. But in doing so he must act fairly, be free from fraud and oppression, act for the interest of the company, and impose no unfair or unreasonable terms. Harts v. Brown, 77 Ill. 226. Where an engagement is entered into by individual members of the board of directors with the majority, the former taking no part in the proceedings of the board had in relation to it, it may be valid in the absence of fraud or collusion. Ibid. The presi-

dent and director of a corporation is not a trustee of a stockholder, therein making it his duty as a purchaser of stock to pay a fair and adequate price for it; to take no advantage of the official relation which he bears to the corporation or of the knowledge acquired thereby; and to disclose to the stockholder all of the material facts within his knowledge not known to the stockholder affecting the value of the stock. Board of Commrs. v. Reynolds, 44 Ind. 509, DOWNEY, C. J., dissenting.

³ Flint, etc., R.R. Co. v. Dewey, 14 Mich. 477. Where a corporation, being insolvent, confessed judgments to one of its directors for advances made and liabilities incurred by him in behalf of the corporation a long time previous, it was held that the mere fact that he was a director did not render the transaction fraudulent; there being nothing which forbids either the members or directors of a corporation to make contracts with it, the same as with an individual. Stratton v. Allen, 16 N. J. Eq. (1 C. E. Green) 229.

merely represent, but actually are the corporation.¹ A writer on the Civil Law says: "Corporations are bound by their contracts in the same manner as individual persons; for, though the members of a corporation cannot separately and individually give their consent in such manner as to oblige themselves as a collective body, yet, being lawfully assembled, it represents but one person, and may consequently make contracts, and by their collective consent, oblige themselves thereunto."² Blackstone³ says: "By the Civil Law this major part must have consisted of two-thirds of the whole, else no act could be performed, which perhaps may be one reason why they required three at least to make a corporation. But with us, any majority is sufficient to determine the act of the whole body. And whereas, notwithstanding the law stood thus, some founders of corporations had made statutes in derogation of the common law, making very frequently the unanimous assent of the society to be necessary to any corporate act, which King Henry VIII. found to be a great obstruction to his projected scheme of obtaining a surrender of the lands of ecclesiastical corporations, it was therefore enacted by statute, 33 Hen. VIII., ch. 27, that all private statutes shall be utterly void whereby any grant or election, made by the head with the concurrence of the major part of the body, is liable to be obstructed by any one or more being the minority." The fundamental principle of every association for the purposes of self-government is, that no one shall be bound except with his own consent expressed by himself or his representatives; but actual assent is immaterial,

¹ Maxwell v. Dullidge Hospital, 1 J. Eq. (2 Stockton) 172; Durfee v. Old Fonbl. Eq. 296, *n.* o; Marshall v. Colony, etc., R.R. Co., 5 Allen, 230; Queensborough, 1 Sim. & Stu. 520; Dudley v. Ky. High School, 9 Bush. 576; New Orleans, etc., R.R. Co. v. Fleckner v. Bank of U. S., 8 Wheat. 338; Bank of U. S. v. Dandridge, 12 Id. 64; Cram v. Bangor House, 12 Me. 354; State v. Wilmington, 3 Harring. 294; Gifford v. N. J. R.R. Co., 10 N.

² Ayliffe Civ. L. Sup. d. 12.

³ Vol. I., p. 478.

the assent of the majority being the assent of all ; and this is not only constructively but actually true ; for that the will of the majority shall in all cases be taken for the will of the whole is an implied but essential stipulation in every compact of the sort ; so that the individual who becomes a member assents beforehand to all measures that shall be sanctioned by the majority of the voices.¹

At common law, where an act is to be done by a corporation as a whole, it is not essential that it be directed by a majority of all the members composing the body, but all are bound by a majority of those who are present at a meeting duly convened, though less than a majority of the corporators. When the management and control of the corporate affairs is committed to a board of directors, as is now done in almost all private corporations, the will or assent of the corporation is expressed through the directors as agents, the whole body of corporators being only called together on very special occasions. In the absence of anything on the subject in the charter or act of incorporation,

¹ Lord v. Governor & Co. of Copper Miners, 2 Phill. 740; Stupart v. Arrowsmith, 3 Sm. & G. 176; Kent v. Jackson, 2 De G. M. & G. 49; Foss v. Harbottle, 2 Hare, 461; *In re St. Mary's Church*, 7 Serg. & Rawle, 517; Horton v. Baptist Church, 34 Vt. 316; Troy & Rutland R.R. Co. v. Kerr, 17 Barb. 581; Black v. Del., etc., Canal Co., 22 N. J. Eq. (7 C. E. Green) 130; East Tenn. R.R. Co. v. Gammon, 5 Sneed, 567; Keyser v. Stansifer, 6 Ohio, 363; Newhall v. Galena, etc., Union R.R. Co., 14 Ill. 273; Mowrey v. Ind. & Cin. R.R. Co., 4 Biss. 78. "That where a charter gives the power of doing corporate acts to a particular body, and makes no mention of the major part, any number, however minute, when all are regularly assembled, may form a corporate assembly, is not only implied from the words of Lord

Hardwicke in the case of the chaplain of Sandford before mentioned (2 Burr. 1019), but seems to be admitted in all the cases where the major part is introduced, these words forming the great objection to the validity of acts done by a smaller number than a majority of the whole. To confer a power of acting on the whole body was, therefore, in effect to enable any part of the body to act if all were regularly summoned; but it might, though erroneously, be apprehended that, unless a power of acting were expressly conferred on the major part, the whole must necessarily assemble; it was therefore as an indulgence, and not to impose a restraint, but to obviate a supposed inconvenience, that the power of acting was conferred on the whole or a major part." 1 Kyd on Corp. 422, 423.

a majority of the directors must be present at a meeting of the board to form a quorum, and then a majority of the quorum determines the action of the board;¹ there being a distinction between an act to be performed by a select and definite body, as by a board of directors, and one to be performed by the constituent members of the corporation.² A corporation may contract by a vote accepting a proposal made in a meeting;³ or by the intervention of some agent duly authorized to contract in its behalf. A contract entered into by a municipal corporation must be made by the common council as a board by the vote or assent of a majority.⁴ Although the acts, doings, and declarations of individual members of a corporation, unsanctioned by the body, are not binding upon it, yet in the absence of any vote, a contract may be shown by inferences drawn from corporate acts, the same as in the case of an individual.⁵

As the charter is an enabling act, giving the corporation all the power it possesses, when the charter prescribes a mode of contracting that mode must be observed.⁶ Where

¹ Wells v. Rahway White Rubber Co., 19 N. J. Eq. 402. See Kirk v. Bell, 16 Q. B. 290; Duncarry v. Gill, 4 C. & P. 121; Brown v. Andrew, 13 Jur. 938; Card v. Carr, 1 C. B. N. S. 197.

² 2 Kent Com. 293. The board cannot, without express authority, delegate its power to act in matters involving personal judgment and discretion to less than a quorum. *In re* Leeds Banking Co., L. R. 1, Ch. 561; Totterdell v. Fareham Brick Co., L. R. 1, C. P. 674. "As the managing body are, in effect, but a committee of the whole body of members, so they may also, for the sake of convenience, constitute, whether for general or special purposes, committees of themselves, and transfer to such committees, but not to a stranger, the requisite powers and authority to act on behalf of the whole body. Such transfer must not

amount to a delegation or abandonment, but the whole body must still retain, and under certain circumstances, *e. g.*, the dismissal of an officer, actually exercise a general control over the doings of such committee." Green's Brice's Ultra Vires, 2d Am. Ed. 543, 544.

³ Maxwell v. Dullidge Hospital, 1 Fonbl. Eq. 296, n. o; Essex Turnpike Corp. v. Collins, 8 Mass. 291.

⁴ Dey v. Jersey City, 19 N. J. Eq. 412.

⁵ Bank of Columbia v. Patterson, 7 Cranch, 299; Props. of Canal Bridge v. Gordon, 1 Pick. 297; Peru Iron Co., *ex parte*, 7 Cowen, 540; Am. Ins. Co. v. Oakley, 9 Paige Ch. 496; Peterson v. Mayor of N. Y., 17 N. Y. 449; N. Y. & Harlem R.R. Co. v. New York, 1 Hilton, 562; Goodwin v. Union Screw Co., 34 N. H. 378; Gowen Marble Co. v. Tarrant, 73 Ill. 608.

⁶ Head v. Providence Ins. Co., 2

a statute prescribes the terms and conditions on which railroad companies shall thereafter issue bonds, bonds issued subsequent to its enactment which do not conform to those conditions, are void, and also the mortgage given to secure them; and the holder of a second mortgage, not made subject to the first mortgage, may take advantage of their want of validity.¹ Although the act creating a corporation provides that a certificate shall be filed as a part of its organization, specifying the name assumed to distinguish such association, and to be used in its dealings, but the act does not declare that a variance in the use of the name thus assumed shall invalidate its contracts, a misnomer in its contract, if there is no doubt of the identity of the corporation, will not vitiate the transaction.² A latent ambiguity as to the particular corporation intended, may, under proper averments, be explained by parol evidence to show the intention, the same as in other cases.³ A corpo-

Cranch, 127; *Abby v. Billups*, 35 Miss. 618. The charter of a mutual insurance company provided that the property insured by the company should be divided by the directors into four distinct classes, and each class be liable for its own losses; that the premium notes of each class should be holden and assessed to pay the losses in their respective classes; and that the policy of each member should designate with which class of risks he was associated. The directors were empowered to determine the rate of insurance and the amount of premium notes, and to order the issuing of all policies. A by-law of the company provided to what class different kinds of property insured should belong. In an action by the company on a premium note, it was set up in defense that the policy was void and note without consideration, because the directors undertook

to insure the defendant in a wrong class of risks. It appeared the contract was fairly made on both sides, with full knowledge of all the facts. It was held that as the company had power to waive the provisions of its by-law, which were introduced for its benefit and protection, it was entitled to recover. *Union Mu. Fire Ins. Co. v. Keyser*, 32 N. H. 313.

¹ *Com. v. Smith*, 10 Allen, 448.

² *Boisgerard v. N. Y. Banking Co.*, 2 Sandf. Ch. 23.

³ *Berks & Dauphin Turnpike Co. v. Myers*, 6 Serg. & Rawle, 12. As to the proper mode of executing written instruments by an incorporated religious society, see *New Market Savings Bank v. Gillet*, 100 Ill. 254. The common seal of a corporation is *prima facie* evidence that it was affixed by proper authority. *Trustees v. McKechnie*, 90 N. Y. 618; *New England Iron Co. v.*

ration cannot make a parol contract unless by the intervention of some agent, duly authorized to contract in its behalf. A parol declaration made to the corporators, at a corporate meeting, would not amount to a contract between the individual and the corporation.¹

Elevated R.R. Co., 91 Id. 153. In the absence of proof, the presumption is that a seal used, is the proper and only seal of the corporation. Phillips v. Coffee, 17 Ill. 155; Miller v. Superior Machine Co., 79 Id. 450.
¹ Andover, etc., Turnpike Corp. v. Hay, 7 Mass. 102.

CHAPTER XI.

POWER TO ACQUIRE, HOLD, AND TRANSFER PROPERTY.

§ 164. At common law.

165. Limitation of right by statute.

166. Statutes of mortmain.

167. Capacity to take by will.

168. Devise or bequest for a charitable use.

169. Grants to religious corporations.

§ 170. Title to real estate.

171. Sale of property by religious corporations.

172. Power to take mortgage security.

173. Mortgaging corporate property.

174. Right of eminent domain.

§ 164. At common law.—Among the powers or capacities incident to a corporation at common law, without any special mention of such a power in the charter, is that of taking, holding, transmitting in succession, and alienating, property, real and personal, and contracting obligations in the same manner as an individual.¹ “All civil corpora-

¹ 1 Blk. Com. 475; *Mayor of Colchester v. Lowten*, 1 Ves. & Beames, 226; *Binney's Case*, 2 Bland Ch. 142; *Lathrop v. Comm. Bank of Sciota*, 8 Dana, 114; *The Banks v. Poitiaux*, 3 Rand. 136; *Reynolds v. Stark County*, 5 Ohio, 204; *Soc. for Prop. Gospel v. Pawlet*, 4 Pet. 480; *Blanchard's Gun Stock, etc., Factory v. Warner*, 1 Blatchf. 258; *Northern Transp. Co. v. Chicago*, 7 Biss. 45; *McCartee v. Orphan Asylum*, 9 Cowen, 437; *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. 280; *Sherwood v. Am. Bible Soc.*, 4 Abb. Ct. of App. Decis. 227; *Spear v. Crawford*, 14 Wend. 20; *Moss v. Averill*, 10 N. Y. 449; *Nicoll v. N. Y. & Erie R.R. Co.*, 12 Id. 121; *Madison, etc., Plank R. Co., v. Watertown, etc., Plank R. Co.*, 5 Wis. 173; *New England Fire,*

etc., Co. v. Robinson, 25 Ind. 536; *Old Colony R.R. Co. v. Evans*, 6 Gray, 25; *New York Dry Docks v. Hicks*, 5 McLean, 111; *Rives v. Dudley*, 3 Jones Eq. 126; *Page v. Heineberg*, 40 Vt. 81; *Thompson v. Waters*, 25 Mich. 214. In *Hayward v. Davidson*, 41 Ind. 212, DOWNEY, J., delivering the opinion of the court, said: “Corporations, when considered with reference to their power to take and hold real estate, may be classified: 1st. There are those whose charter or law of creation forbids that they should acquire and hold real estate. When this is the case, the corporation cannot take and hold real estate, and a deed or devise to such a corporation can pass no title. 2d. Those whose charter or law of creation is silent as to whether they may or may

tions," says Kyd,¹ "such as the corporations of mayor and commonalty, bailiffs and burgesses of a town, or the corporate companies of trades in cities and towns, and all corporations established by act of Parliament for some specific purpose, unless expressly restrained by the act which established them, or by some subsequent act, have, and always have had, an unlimited control over their respective properties, and may alienate in fee, or make what estates they please, for years, for life, or in tail, as fully as any individual may do with respect to his own property." "The only legal check to the acquisition of lands by corporations, consists in those special restrictions contained in the acts by which they are incorporated, and which usually confine the capacity to purchase real estate to specified and necessary objects, and in the force to be given to the exception of corporations out of the statute of wills."²

The chief objection to permitting corporations to take, hold, or convey land, has been stated to be: 1. The danger of their speculating in land to large amounts, keeping it unimproved, and thereby retarding the settlement and cultivation of the country, or, if improved, preventing settlers from obtaining clear or independent titles, and introducing a system of tenancies in which the tenants would be in a great measure dependent upon the corporations; 2. The holding of such land for a long period of

not acquire and hold the title to real estate. It is as to corporations of this class that most of the difficulties and doubts arise. As a general rule, it may be said that in such cases there is no power to acquire and hold such property. But if the objects for which the corporation was formed cannot be accomplished without acquiring and holding the title to real estate, the power to do so would undoubtedly be implied. 3d. Those corporations whose charter or law of creation authorizes them in some cases, or for some purposes, to take and hold the title to real estate.

Counties which are *quasi* corporations fall under this division. In these cases the rule seems to be that, as the corporation may for some purposes acquire and hold the title to real estate, it cannot be made a question by any party except the State, whether the real estate has been acquired for the authorized uses or not." Referring to *Leazure v. Hillegas*, 7 Serg. & Rawle, 313; *Chambers v. St. Louis*, 29 Mo. 543, and cases cited.

¹ Corp., Vol. 1, p. 108.

² 2 Kent's Com. 356.

time, transmitted by perpetual succession, without any change, as in the case of natural persons; and 3. The influence which wealthy corporations, holding large bodies of land in the State, might exert over the legislature.¹

The implied right of a corporation to acquire and hold property is subject to the qualification that the property must be reasonably called for to subserve and carry out the objects of the incorporation, and not obtained for a purpose wholly outside or foreign thereto.² A corporation aggregate cannot hold lands in joint tenancy, either jointly with another corporation, or with a natural person, none but natural persons being competent to take such an estate, because, as the corporation never dies, the natural person cannot have the advantage of the incident of survivorship, while he would be subject to it. But a corporation may hold lands in common with a natural person, survivorship not being incident to lands so held.³ After the granting

¹ *Thompson v. Waters*, 25 Mich. 214, per CHRISTIANCY, J. It has been said that "banks are formed and organized for commercial purposes, and not to deal in real estate. Their business is to discount and negotiate promissory notes, drafts, bills of exchange, and other evidences of debt, the buying and selling of bills, bullion, and the lending of money on personal security. To permit them to loan their money on real estate security, would be destructive of their efficiency, and defeat the object had in view in their creation. Instead of being agents for purposes of trade, dealing in commercial paper, discounting notes, and furnishing the necessary facilities for loans, they would have their capital locked up in landed property, and thus be powerless to carry on the business which induced their organization. These speculations in real estate are also hazardous, and have no legitimate connection with the business of banking; they require the em-

ployment of outside parties to look after the land and examine titles, and are apt to embark the bank in enterprises which sooner or later will end in insolvency." WARNER, J., in *Mathews v. Skinker*, 62 Mo. 329.

² *Pacific R.R. Co. v. Seely*, 45 Mo. 212; *Rensselaer, etc., R.R. Co. v. Davis*, 43 N. Y. 137; *Occum Co. v. Sprague Co.*, 34 Conn. 529; *Coleman v. San Rafael Turnp. Co.*, 49 Cal. 517.

³ 2 Blk. Com. 184; 1 Kyd on Corp. 72; *Telfaire v. Howe*, 3 Rich. Eq. 235. Sir Edward Coke says: "The &c. at the end of this section implieth that so it is, if any body politic or corporate, be they regular as dead persons in law, or secular, as if lands be given to two bishops to have and to hold to them two and their successors, albeit the bishops were never any dead persons, in law, but always of capacity to take, yet seeing that they take this purchase in their politic capacity as bishops, they are frequently tenants in common be-

of a charter, a corporation is created capable of taking a deed of real estate, although at the time of the conveyance the corporation was not fully organized by the election of officers;¹ though formerly, as a general rule, when a corporation aggregate had by its constitution a head, a grant to the corporation in the vacancy of the headship was void, for the reason that without the head, the corporation being incomplete, could not signify its acceptance.² In the absence of any express or implied prohibition, a railroad company has power to sell and convey whatever property it may hold not acquired under the right of eminent domain, or not so connected with the franchise to operate and manage a railroad that the alienation would tend to disable the company from performing the public duties imposed upon it.³

§ 165. **Limitation of right by statute.**—It is usually provided by the charter or act of incorporation, or by general statutes affecting all corporations, that the property acquired and held by the corporation shall be limited to a specified amount; and the limitation also sometimes embraces the kind of property, and the uses to which it shall be devoted. The disability of a corporation to hold land, implies a disability to become the grantee and vendor of real estate. There can be no grant of land without a grantee capable of taking; and he who takes and conveys to another must necessarily be, for the time intervening,

cause they are seized in several rights; for the one bishop is seized in the right of his bishoprick of the one moiety, and the other is seized in the right of his bishoprick of the other moiety, and so by several titles and in several capacities; whereas joint tenants ought to have it in one and the same right and capacity, and by one and the same joint title." Co. Litt. lib. 3, ch. 4, sec. 296.

¹ Rathbone v. Tioga Nav. Co., 2 Watts & Serg. 74.

² 1 Kyd on Corp. 106.

³ Hendee v. Pinkerton, 14 Allen, 381. Where real estate has been given to ecclesiastical, charitable, municipal, and similar corporations, a court of equity will interfere to prevent a disposition of it which will obstruct the proper performance of the trust. Attorney-General v. Mayor, etc., of Plymouth, 9 Beav. 67; Reg v. Mayor, etc., of Liverpool, 9 A. & E. 435.

the holder of the estate. If the restriction in the charter takes away the capacity to hold, it must therefore take away the power of receiving the estate for the purpose of conveying to another. The corporation cannot deal in real estate, receiving and conveying the title in its corporate capacity, without in every instance holding that estate; and a title derived through it, to be good, must necessarily imply the right of the corporation to take the estate, and hold the title until conveyed.¹ It has, however, been decided that an incapacity to purchase or acquire will not be inferred from a prohibition to hold, though the policy of the latter be to prevent the accumulation by the corporation of a specified description of property, if the object of the conveyance be a sale of the property, and the application of the proceeds to the objects contemplated by the statute.² Under a charter authorizing a corporation to purchase, hold, sell, and convey such real and personal estate as the purposes of the corporation should require, the question whether certain land claimed by the corporation is necessary for its purposes, is solely a matter between the government and the corporation.³ Where, therefore, a bank was authorized by its charter to purchase, hold, possess, and enjoy real and personal property to the amount of two millions of dollars and no more; "Provided, nevertheless, that such lands and tenements which the said corporation is hereby entitled to purchase and hold, shall only extend to such lot and lots of ground, and convenient buildings and improvements thereon erected, or to be erected, which they may find necessary and proper for the carrying on of the business of the said bank, and shall actually occupy for that purpose"; and the bank purchased land in

¹ See *Bank of Michigan v. Niles*, 1 Doug. Mich. 401.

² *The Banks v. Poitiaux*, 3 Rand. 136; *Baird v. Bank of Washington*, 11 Serg. & Rawle, 411.

³ *Natoma Water & Mining Co. v. Clarkin*, 14 Cal. 544; *Barrow v. Nashville, etc., T. Co.*, 9 Humph. 304; *Goundie v. Northampton Water Co.*, 7 Barr. 233.

a distant part of the State and sold the same, it was decided that the grantee held the title defeasible only by the State.¹ So, where the charter of a bank provided that the bank should only purchase and hold such real estate as should be needed for its immediate accommodation, or acquired in satisfaction of debts, it was held that the legal title passed to the bank by a conveyance, and its deed would transfer the title; and that although if the bank in making the purchase had violated its charter, the corporation for that cause might be dissolved at the suit of the State; yet if this had not been done, a purchaser could not resist a specific performance of his contract on the ground that the bank had exceeded its powers.²

When the charter limits the capital stock to a specified amount, this does not in itself limit the power of the company to take and hold property and incur obligations therefor beyond the amount of the capital.³ And notwithstanding the corporation is restricted by its charter to a certain amount in value of real estate, the title of the corporation will not be affected by the rise of the land in value subsequent to its purchase.⁴ So, where a purchase of real estate has been lawfully made by a corporation, the purchase does not cease to be legal, or the corporation cease to have a right to hold or convey the property thus acquired, merely

¹ *Leazure v. Hillegas*, 7 Serg. & Rawle, 313.

² *The Banks v. Poitiaux*, *supra*.

³ *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. 280. In *State v. Morristown Fire Assoc.*, 3 Zab. 195, GREEN, C. J., said: "The phrase 'capital stock,' as employed in acts of incorporation, is never, that I am aware, used to indicate the value of the property of the company. It is very generally, if not universally, used to designate the amount of capital to be contributed by the stockholders for purposes of the corporation. The amount thus con-

tributed constitutes the 'capital stock' of the company. The value of the stock may be greatly increased by surplus profits, or be diminished by losses, but the amount of the capital stock remains the same. The funds of the company may fluctuate. Its capital stock remains invariable, save by legislative enactment."

⁴ *Harpending v. Dutch Church*, 16 Pet. 492; *Humbert v. Trinity Church*, 24 Wend. 587; *Bogardus v. Trinity Church*, 4 Sandf. Ch. 758, 759; *Harvard College v. Boston*, 104 Mass. 470.

because the object which induced the purchase has been accomplished, or no longer affords an inducement to retain it.¹

Corporations, though limited in duration, may purchase and hold a fee, and they may sell such real estate whenever they find it no longer necessary or convenient.²

§ 166. **Statutes of mortmain.**—In England the common law capacity of every corporation to purchase and hold real estate was abridged at a very early period by a great variety of statutes, commonly called the statutes of mortmain, the general appellation of mortmain being applied to alienation *in mortua manu*, or in a hand that never dies. These restraints were at first introduced to prevent the too great accumulation of land by ecclesiastical bodies, the members of which were reckoned dead persons in law, who might otherwise absorb in perpetuity large quantities of valuable real estate, and thus withdraw it from feudal services and from transmission from man to man.³ It was accordingly enacted that to enable corporations to purchase land, they must obtain a license in mortmain from the crown; for as the king is the ultimate lord of every fee, he cannot without his consent be deprived of the privilege of escheats and other feudal profits by the vesting of lands in those that

¹ A contract entered into by a railroad company, with a party to buy of the company land purchased by it in order to have gravel dug therefrom and transported to be delivered to and used by a third person, is valid, the land having been originally bought by the company as a means of increasing its business of transportation. *Old Colony R.R. Corp. v. Evans*, 6 Gray, 25.

² *Nicoll v. N. Y. & Erie R.R. Co.*, 12 N. Y. (2 Kernan) 121; *People v. Mauran*, 5 Denio, 389; *Asheville Division No. 15 v. Aston*, 92 N. C. 578; *State v. Rives*, 5 Ired. 297. See *School Dist. No. 5 v. Everett*, 52 Mich. 314.

At common law, a grant to a natural person without words of inheritance, creates only an estate for the life of the grantee; for he can hold the property no longer than he himself exists. By analogy to this, a grant to a corporation aggregate, limited as to the duration of its existence, without words of perpetuity being annexed to the grant, would only create an estate for the life of the corporation. *Turnpike Co. v. Illinois*, 96 U. S. 63. See *Northern Liberty Market Co. v. Kelly*, 113 U. S. 199.

³ *Co. Lit.* 2, b.; 1 Kyd on Corp. 78, 79; 1 Blk. Com. 479.

can never be attainted or die. Besides the general license from the king as lord paramount of the kingdom, it was also necessary, when there was a mesne or intermediate lord between the king and the alienor, to obtain also his license for the alienation. If no such license were obtained, the king or lord might enter on the land aliened as a forfeiture. It is said that licenses in mortmain were required among the Saxons more than sixty years previous to the Norman conquest.¹ The early mortmain acts were solely directed against ecclesiastical corporations. But the statute of 15 Richard 2d, ch. 5, declared that civil or lay corporations were equally within the prohibition; and this statute made lands conveyed to any third person for the use of the corporation liable to forfeiture, in like manner as if conveyed directly in mortmain.² The fact that the statutes of mortmain originally related only to ecclesiastical corporations "affords one strong presumption, if direct proof were wanting, that civil corporations were of much later origin than the ecclesiastical. The former began now, however, to attract the public attention, and the same inconveniences to be felt from the appropriation of land or tenements by them as by the latter. It was therefore enacted by the same statute that it should extend to lands, tenements, fees, advowsons, and other possessions purchased or to be purchased to the use of guilds or fraternities; and 'because mayors, bailiffs, and commons of cities, boroughs, and other towns which had perpetual commonalty, and others who had perpetual offices, were as perpetual as people of religion,' it was enacted that these should not purchase to them and to their commons or office under the penalty mentioned in the same statute *de religiosis*, and that others should not take to their use under the same penalty."³ Unincorporated bodies were not subjected to statutory restrictions until the act of 23 Henry 8th, ch. 10.⁴

¹ 2 Blk. Com. 268, 269.

² Ibid.

³ 1 Kyd on Corp. 95.

⁴ 2 Blk. Com. 272.

The statutes of mortmain made no mention of personal property, but left to corporations aggregate in general, power to take such property without limitation; though it is said that in England many corporations established by act of Parliament for some particular purpose are restricted in this respect as well as in their power to purchase land.¹

It is stated by Gibbon² that under the civil law there were many enactments having the same design as the English statutes of mortmain, which provided that no real estate should be given or bequeathed to any corporate body without either a special privilege or a particular dispensation from the emperor or senate.

In Pennsylvania the English statutes of mortmain are in force with respect to the dedication of lands, tenements, or hereditaments to superstitious uses, unless sanctioned by charter or act of the legislature.³ It is said by Kent that in this country, with the foregoing exception, the statutes of mortmain have not been re-enacted or generally assumed to be in force, "and the only legal check to the acquisition of lands by corporations consists in those special restrictions contained in the acts by which they are incorporated and which usually confine their capacity to purchase real estate to specified and necessary objects and in the force to be given to the exception of corporations out of the statute of wills."⁴

§ 167. Capacity to take by will.—Originally, the law of

¹ 1 Kyd on Corp. 104. See Atty. Genl. v. Parsons, 8 Ves. 191; Atty. Genl. v. Munby, 1 Meriv. 345; Corbyn v. French, 4 Ves. 428.

² Vol. 2, p. 355. See 1 Browne Civil and Adm. Law, 142.

³ 3 Binney App. p. 626; Methodist Church v. Remington, 1 Watts, 218; Purdon's Dig. 350. See Miller v. Porter, 53 Pa. St. 292; Leazure v. Hillegas, 7 Serg. & Rawle, 313; Runyan v.

Coster, 14 Peters, 122. It is provided by act of Congress that a corporation or association for religious or charitable purposes cannot acquire or hold real estate in any Territory of the United States exceeding in value fifty thousand dollars, without being liable to forfeiture and escheat to the United States. U. S. Rev. Sts., sec. 1890.

⁴ 2 Kent's Com. 331-334. See Vansant v. Roberts, 3 Md. (1 Miller) 119.

ancient Athens provided that the estate of a deceased person should invariably descend to his children, or, in case of a failure of lineal descendants, should go to the collateral relations. Afterward, the laws of Solon permitted, on a failure of issue, the disposal of lands by testament.¹ In England, before the Norman conquest, real estate was devisable by will.² But upon the introduction of military tenures, the restraint of devising land became a part of the feudal doctrine of non-alienation without the consent of the lord.³ The feudal restraint upon alienations by will continued for several centuries, "from an apprehension of infirmity and imposition on the testator *in extremis*, which made such devises suspicious; besides, in devises there was wanting that general notoriety and public designation of the successor, which in descent is apparent to the neighborhood, and which the simplicity of the common law always required in every transfer and new acquisition of property."⁴ After, however, the invention of the doctrine of uses as something distinct from the land, uses began to be devised, and the devisee of the use could in equity compel its execution.⁵ At common law, personal property might be bequeathed to corporations as well as to individuals.⁶ The statutes of 32 Henry 8th, chapter 1, and 34 and 35 Henry 8th, ch. 5, usually called the statutes of wills, enabled every one having a sole estate or interest in fee simple, to give, dispose, will, or devise to any person or persons, except bodies politic and corporate, by last will and

¹ Plutarch's Life of Solon.

² Wright on Tenures, 172.

³ 2 Blk. Com. 272.

⁴ *Ib.* 375.

⁵ Chief Baron GILBERT (Devises, 6) says that uses were introduced by the clergy to evade the statutes of mortmain, and that as the clergy generally sat in chancery, where these uses were solely cognizable, they suffered them to

be disposed of by will, as the *usus fructus* was by the civil law. In Doctor and Student (Dialogue 2, ch. 22), it is said that uses were chiefly continued for the sake of the foregoing power.

⁶ Phillips Academy v. King, 12 Mass. 546; McCartee v. Orphan Asylum Soc., 9 Cowen, 437; Matter of Howe, 1 Paige Ch. 214. See Rivanna Nav. Co. v. Dawson, 3 Gratt. 19.

testament in writing. Previous to these enactments there was no general testamentary power in England of freehold lands of inheritance. In consequence of the exception, no corporation could take by devise, unless in places where there was a custom to devise to corporations land lying within the district over which the custom extended. A devise of real estate to a corporation, whether for its own benefit or for purposes of trust for the benefit of others, was void unless the heir chose to consent.¹

The English statute of wills became a part of the law of New York upon the adoption of the first constitution of that State in 1777. By the statute of New York of 1813,² corporations were excluded from taking land by devise. This continued to be the law until the revised statutes went into effect, which provide that no devise to a corporation shall be valid, unless such corporation by its charter or by statute is expressly authorized so to take;³ and it has been held that the prohibition includes devises by way of use.⁴

¹ *Souley v. Clockmakers' Co.*, 1 Bro. Ch. Cas. 81; *Lord Cornbury v. Middleton*, Chanc. Cas. 209. "The acts of 7 Wm. 4, and 1 Vict., ch. 26, have repealed 34 and 35 Hen. 8, ch. 5, and have not revived the prohibition against corporations taking real estate by devise. At present, therefore, the law is, that every corporation which is empowered by license in mortmain to take and hold real property at all, may take it by way of devise to the extent of its license, as well as by any other means." *Grant on Corp.* 112, 113.

² 1 Rev. Laws, 364.

³ N. Y. Rev. Sts., 7th Ed., pp. 2283, 2284.

⁴ *Downing v. Marshall*, 23 N. Y. 366. See *Sherwood v. Am. Bible Soc.*, 1 Keyes, 561; *Kerr v. Dougherty*, 79 N. Y. 327. Statutes of wills are enabling acts. Prior to them there was in general no power at common law to devise

lands. It was a part of the feudal policy that lands could not be alienated without the consent of the lord, and the power to devise lands was opposed to this policy. If permitted, it would have deprived the lord of many of the incidents and profits of the feudal tenure. These statutes were not restrictive of antecedent rights, but conferred a limited power to devise. They permitted all persons, except feme coverts, infants, idiots, and persons of nonsane memory, having a sole estate in fee simple of any manors, etc., to give, dispose, will, or devise to any person or persons except bodies politic or corporate. The English statute of wills was substantially re-enacted in the State of New York by statutes passed in 1787 and in 1813. At the revision in 1830, the language was changed so as to provide that a testator might devise his lands to any person capable by law

Power in a corporation to purchase, hold, and convey real estate does not include the right to take by devise.¹ Where a corporation is prohibited by its charter from taking real estate by devise, it will depend upon a construction of the language of the prohibitory clause whether the intention of the testator can be carried out by converting the land into personalty.² A corporation created in one State may take property under a will executed by a citizen of another State, if by the law of its creation it has authority

of holding real estate, but that no devise to a corporation should be valid unless such corporation was expressly authorized by its charter or by statute to take by devise. *Matter of Will of Fox*, 52 N. Y. 530, per ANDREW, J. In the same case, the Supreme Court of the United States (94 U. S. 315) in affirming the judgment, per FIELD, J., said: "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. The power of the State in this respect follows from her sovereignty within her limits as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal government. The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed under the control of the Federal authority. Such control would be foreign to the purposes for which the Federal government was created,

and would seriously embarrass the landed interests of the State."

¹ *McCartee v. Orphan Asylum Soc.*, 9 Cowen, 437; *Theological Seminary v. Childs*, 4 Paige Ch. 419; *Canal Co. v. R.R. Co.*, 4 Gill & Johns. 1. Article 38 of the bill of rights of Maryland provides that every gift, sale, or devise of real or personal property for religious purposes, to take effect after the death of the seller or donor, without the prior or subsequent sanction of the legislature, shall be void. The distinction between a gift and a sale and a devise is thus expressly recognized by the constitution. When, therefore, the legislature authorizes a religious body to take and hold subscriptions or contributions in money or otherwise, for religious purposes, the power thus conferred to take by gift does not embrace power to take by will. *Brown v. Thompson*, 49 Md. 423.

² *Am. Bible Soc. v. Noble*, 11 Rich. Eq. 156; *Baker v. Clarke Inst.*, 110 Mass. 88; *State v. Wiltbank*, 2 Harring. 18. In the last-mentioned case, all devises of land to a religious corporation in Delaware being void, it was held that a bequest to such a corporation of money to arise out of land by sale or otherwise was void, the proceeds being deemed realty, and a bequest of them subject to the same rule as a devise of the land itself.

to acquire property by devise or bequest. "When within the *lex domicilli*, a will has all the forms and requisites to pass the title to personalty, the validity of particular bequests will depend upon the domicile of the legatee and of the government to which the fund is by the terms of the will to be transmitted for administration, and the particular purposes indicated by the testator. If the legatee, whether a natural or artificial person, and whether he takes in his own right or in trust, is capable by the law of his domicile to take the legacy in the capacity, and for the purposes for which it is given, and the bequest is in other respects valid, it will be sustained irrespective of the law of the testator's domicile; subject to the qualification, that if the law of the testator's domicile in terms forbids bequests for any particular purpose, or in any other way limit the capacity of the testator in the disposal of his property by will, a gift in contravention of the law of the testator's domicile would be void everywhere. So far as the validity of bequests depends upon the general law and policy of a State affecting property and its acquisition generally, and relating to its accumulation, a suspension of ownership, and the power of alienation, each State is sovereign as to all property within its territory, whether real or personal. But it is no part of the policy of a State to interdict perpetuities or gifts in mortmain in other States; each State determining those matters according to its own views of policy or right."¹

¹ Chamberlain v. Smith, 43 N. Y. 424, per ALLEN, J., referring to Sherwood v. Am. Bible Soc., 1 Keyes, 565; Harris v. same, 4 Abb. N. S. 421; Andrews v. Heriot, 4 Cowen, 517; Parsons v. Lyman, 20 N. Y. 103; Moulton v. Hunt, 23 Id. 394; Lawrence v. Kitteridge, 21 Conn. 577. See Starkweather v. Am. Bible Soc., 72 Ill. 50. Upon the bequest of a fund in England, to be invested in a Scotch entail, Lord COT-

TENHAM said: "An objection was made that the bequest of a fund to be invested in a regular Scotch entail was void as a perpetuity. The rules acted upon by the courts of this country with respect to testamentary dispositions tending to perpetuities, relate to this country only. What the law of Scotland may be upon such a subject, the courts of this country have no judicial knowledge, nor will they, I apprehend

Where the statute of a State provides that a corporation shall not take and hold real estate by devise, the disability is fundamental, and the corporation is incapable of taking, no matter where the devisor may reside, or the lands are situated.¹ But there is a distinction between an incapacity to take created by the statute of a State which is local, and a prohibitory clause in a charter which everywhere attaches to the corporation. The act creating a corporation empowered it to hold, purchase, and convey such real and personal estate as the purposes of the corporation should require, not exceeding the amount limited in its charter, and the statute of wills of the State provided that no devise of real estate to a corporation should be valid unless such corporation was expressly authorized by its charter or by statute to take by devise, it was held that the statute of wills did not disable the corporation from taking by devise, under the general provisions of its charter, lands situate elsewhere than in the State of its creation.² In such case, the statute of wills is regarded as designed to regulate the testamentary power of the citizens of the State where it is enacted, not of the citizens of other States.³ Where, therefore, a New York corporation was not expressly authorized by its charter to take by devise, nor prohibited from so taking, it was held that the courts of Connecticut must look to their own statutes and laws, and not to those of New York, to determine whether or not the corporation could take by devise in Connecticut.⁴ A corporation may

inquire. The fund being to be administered in a foreign country, is payable here, though the purpose to which it is to be applied would have been illegal if the administration of the fund had been to take place in this country. This is accomplished by the well-established rule in cases of bequests within the statute of mortmain. A charity legacy, void in this country under the statute of mortmain, is good

and payable here if for a charity in Scotland."

¹ *Starkweather v. Am. Bible Soc.*, 72 Ill. 50.

² *Am. Bible Soc. v. Marshall*, 15 Ohio St. 537. See *Christian Union v. Yount*, 101 U. S. 352.

³ *Thompson v. Swoope*, 24 Pa. St. 474; *Sherwood v. Am. Bible Soc.*, 4 Abb. Ct. of App. Decis. 227.

⁴ *White v. Howard*, 38 Conn. 342.

take under a devise by another name than its true one, if there be no doubt what corporation was intended, extrinsic evidence being admissible to establish its identity.¹

§ 168. **Devise or bequest for a charitable use.**—The law of charitable uses was known in England at an early period, long before the statute of 43 Elizabeth; its general maxims being derived from the civil law, as modified in the later periods of the empire by the ecclesiastical element introduced with Christianity.² The statute of 43 Eliz., ch. 4, after reciting in substance that, whereas lands, tenements,

In the foregoing case, the court said: "There is no prohibition in the charter; the inability is created by the New York statute of wills, expressly excepting corporations from taking by devise. Now, this corporation brings with it from New York its charter, but it does not bring with it the New York statute of wills, and it cannot bring it to be recognized as law within this jurisdiction." See *Boyce v. St. Louis*, 29 Barb. 650. *White v. Howard*, 46 N. Y. 144; *Fellows v. Miner*, 119 Mass. 541; *Ould v. Washington Hospital*, 95 U. S. 313.

¹ *Kentucky Seminary v. Wallace*, 15 B. Mon. 35; *Vansant v. Roberts*, 3 Md. Ch. 119; *N. Y. Annual Conference Soc. v. Clarkson*, 4 Halst. Ch. 541; *Ayres v. Weed*, 16 Conn. 291; *Bodman v. Am. Tract Soc.*, 9 Allen, 447. See *Brewster v. McCall*, 15 Conn. 274; *Asheville Div. No. 15 v. Aston*, 92 N. C. 578.

² See *Williams v. Williams*, 8 N. Y. (4 Seld.) 525; *Griffith v. State*, 2 Del. Ch. 421. "Prior to the statute of uses (27 Henry VIII.) these limitations were perhaps only known in their simplest and most elementary form, that is to say, in the form of legal estates held by one person for the benefit of another, without any active duty or trust. In this form, they were abro-

gated by that statute. This was done, not by defeating the feoffment or devise to such a use, but by vesting the legal estate in the beneficiary. After the statute, uses were revived under the name of trusts. By a strict construction of that enactment, passive trusts might still be created by limiting a use upon a use; it being held that the statute only executed the use in the first *cestui que use*, who was allowed to hold the estate for the benefit of the second. This was doubtless an evasion of the letter and policy of the statute; but neither its letter nor policy stood in the way of creating active trusts, that is, legal estates impressed with some active duty in their control, management, or disposition, for the benefit of some person or class of persons other than the trustee. Trusts of this kind grew up to meet the wants and wishes of mankind. As the old statute of uses, which was intended to abolish passive trusts, left the widest field for the creation of active ones, so our revision, in abrogating all active trusts excepting those specified, revived them under the name of powers, which were left unrestricted, provided the purpose or power was in itself lawful." COMSTOCK, J., in *Downing v. Marshall*, 23 N. Y. 366.

etc., had been heretofore given by well-disposed persons for charitable objects, but had not been employed to the charitable intent of the donors by reason of fraud, breaches of trust, and negligence, enacted that the Lord Chancellor might award commissions under the great seal, authorizing commissioners to inquire in relation to such gifts, and to make orders which should be executed.¹ A devise to a corporation under the foregoing statute, for a charitable use, was at first deemed void at law; but courts of equity sustained such a devise, not as conveying the land to the corporation, but subject to and clothed with the use designed by the testator.²

A gift intended to promote the public good by the encouragement of learning, science, and the useful arts; or to improve a city, support public buildings, bridges, etc.; or to endow a college, or establish new scholarships therein, are severally regarded as a charity, without any particular reference to the poor.³ Bequests to charitable uses are

¹ The proceeding is now by way of information, though it is said that if there be ground for interference, the court will act without complaint. *Mayor, etc., of Ludlow v. Greenhouse*, 1 Bli. N. S. 61; *Atty. Genl. v. Cooper's Co.*, 19 Ves. 194.

² By the strict rules of the common law, a corporation aggregate cannot be seized to the use of another, though, notwithstanding this rule, many corporations are made trustees for charitable purposes, and compelled to perform their trusts whenever an individual may so act. *Kyd on Corp.* 72; *Gilbert, Uses and Trusts*, 5, 170; *Jeremy's Eq. Juris.*, book 1, p. 19; *Atty. Genl. v. Stanford*, 2 Swanst. 594; *Green v. Rutherforth*, 1 Ves. Sen. 468; *Coventry v. Atty. Genl.*, 2 Bro. P. C. 235; *Trustees of Phillips Academy v. King*, 12 Mass. 566. In New York a conveyance or transfer of property, for the

benefit or use of a moneyed corporation, is not valid unless made directly to the corporation. *Wright v. Douglass*, 10 Barb. 97.

³ *Am. Academy of Arts & Sciences v. Harvard College*, 12 Metc. 582; *Atty. Genl. v. Lonsdale*, 1 Sim. 109. *Grant (Corp.* 115, 116) says: "The legal definition of a charity with reference to the statute of charitable uses, 43 Eliz., ch. 5, is a gift to a general public use which extends to the rich as well as to the poor. General devises and bequests, having for their object the establishment of learning, are considered given to charitable uses under the statute of Elizabeth; and accordingly a devise to a school, for the education of gentlemen's sons, was held to be a devise to a good charitable use within the statute." See *Thompson v. Norris*, 20 N. J. Eq. 489; *Stevens v. Shippen*, 28 Id. 487; *Bethlehem v. Per-*

valid in Maine, Vermont, Massachusetts, Pennsylvania, Kentucky, North Carolina, and Georgia;¹ but not, it seems, in Maryland and Virginia.² Courts of equity in California have jurisdiction, derived from the English common law, independently of the statute of Elizabeth, to establish and enforce charities when trustees competent to take the legal estate are named, and the class to be benefited and the individuals to be designated by the trustees are capable of ascertainment.³ In New York, in *Potter v. Potter*,⁴ the Chancellor said: "Although some doubt was thrown upon charitable donations for the benefit of a community or

severance Fire Co., 81 Pa. St. 445; *Fairbanks v. Lamson*, 99 Mass. 533; *Old South Soc. v. Crocker*, 119 Id. 1; *Starkweather v. Am. Bible Soc.*, 72 Ill. 50; *In re Clark's Trust*, L. R. 1, Ch. 497; *Fellows v. Miner*, 119 Mass. 541.

¹ *Preachers' Aid Soc. v. Rich*, 45 Me. 552; *Burr v. Smith*, 7 Vt. 241; *Sanderson v. White*, 18 Pick. 333; *Burbank v. Whitney*, 24 Id. 146, and cases cited; *Sohier v. St. Paul's Church*, 12 Metc. 250; *Brown v. Kelsey*, 2 Cush. 243; *Whitman v. Lex*, 17 Serg. & Kawle, 88; *Glass v. Wilhite*, 2 Dana, 170; *White v. Atty. Genl.*, 4 Ired. Eq. 19; *Beall v. Fox*, 4 Ga. 404. In Pennsylvania a trust to an unincorporated religious society, the members of which reside in the State, is valid. *Methodist Church v. Remington*, 1 Watts, 218. In *Zimmerman v. Anders*, 6 Watts & Serg. 218, it was held that the conservative provisions of the statute of 43 Eliz. had been in force in Pennsylvania by common usage and constitutional recognition, as well as the more extensive range of charitable uses which chancery supported previous to that statute and beyond it. The law of charitable uses as it existed in England at the time of the American Revolution, and the jurisdiction of the court of chancery over these subjects, be-

came the law of the State of New York upon the adoption of the State constitution in 1777. *Williams v. Williams*, 8 N. Y. (4 Seld.) 525, per DENIO, J., GARDINER, JOHNSON, and TAGGART, JJ., dissenting. The legislature of New York has at all times exercised the power to except from the operation of the statute of wills such corporations as it deemed proper, and of late years has exercised the power with liberality in favor of corporations organized for charitable purposes. *White v. Howard*, 46 N. Y. 144, per GROVER, J. For construction of act of New York of 1848, ch. 319, relative to devise or bequest to benevolent, charitable, scientific, and missionary societies, see *Stephenson v. Hart*, 92 N. Y. 433; *Hollis v. Hollis*, 29 Hun, 225.

² *Dashiell v. Atty. Genl.*, 5 Harr. & Johns. 392; *Gallego v. Atty. Genl.*, 3 Leigh, 450. In Virginia, by the acts of 1789 and 1790, a commission was appointed on the English statutes, and the act of 1792 repealed all the English statutes then in force, including the statute of 43 Eliz. if it ever was in force in that State.

³ *Estate of Hinckley*, 58 Cal. 457. See *Commissioners of Lagrange v. Rogers*, 55 Ind. 297.

⁴ 6 Paige Ch. 639.

body not incorporated so as to be capable of taking and conveying the legal title to property, by the decision of the Supreme Court of the United States in the case of the Baptist Association v. Hart's Executors,¹ I believe it is generally admitted that the decision in that case was wrong; and it may now be considered as an established principle in American law, that the Court of Chancery will sustain and protect such a gift, bequest, or dedication of property to public or charitable uses, provided the same is consistent with local laws and public policy, where the object of the gift or dedication is specific and capable of being carried into effect according to the intention of the donor. A devise of real estate, under the provisions of the revised statutes, may perhaps form an exception to the general principle, as a devise of real estate can only be made to a person capable of holding the same for the purposes of the charity." In *Inglis v. The Trustees of the Sailors' Snug Harbor*,² the Supreme Court of the United States sustained, upon common law principles, a devise to the chancellor of New York, and to the mayor and recorder of the city of New York, of an estate in trust for building a marine hospital for the support of infirm sailors, to be under the superintendence and visitatorial control of the trustees and their successors, with a request that they should be incorporated by an act of the legislature if they could not take and act in a corporate capacity without such a legislative enactment. The legislature of New York having, about a year after the testator's death, incorporated

¹ 4 Wheat. 1. See *Cromie v. Louisville Orphans' Home Soc.*, 3 Bush. 365; *Cruse v. Axtell*, 50 Ind. 49.

² 3 Pet. 112. The Supreme Court of the United States held that an unincorporated association could not take land by devise in the name of the society, and that such a devise could not be executed by a court of equity as a char-

ity at common law. *Trustees of Phila. Baptist Assoc. v. Hart*, 4 Wheat. 1. But in a subsequent case the same court sustained a bill by the nominal trustees of an unincorporated religious society to protect its right to a lot of ground granted for the use of the society. *Beatty v. Kurtz*, 2 Pet. 566.

the persons named as trustees, the donation was held good as an executory devise.¹

Where the trust is legal and definite as to the person to whom the gift is made, and the thing given only requires a trustee to carry out the purposes of the donor, a court of equity will preserve the trust fund from lapsing. In Illinois a person had made a will in which he directed that his estate should be reduced to money, and be divided: one-half to the school district in which his farm was situated, and the fund be managed by a trustee who was to be elected by the people of the district for four years. The trustee was to give security and discharge his duties without compensation. The interest of the other half was to be applied to the support of the poor of the county. No person could be found who would take charge of the first-mentioned fund, and manage it for the use of the schools of the district; and as to the other fund, no trustees were named, or any mode pointed out by which trustees were to be obtained. It was held that as these objects were within the language of 43 Eliz., ch. 4, which was in force in the State, there was power to execute the trust *cy pres*, and trustees were designated to carry out the provisions of the will. It was said by the court that the bequest for school purposes being made to a corporation capable of taking, the instrument to control its application could be provided by a resort to a court of equity; and that, as to the fund bequeathed to the poor, the county court was the proper

¹ See *Moore v. Moore*, 4 Dana, 354. In New York, although trusts to receive and apply rents and profits may be created under the statute of uses and trusts, and a power to a trustee to sell land and pay over the proceeds to an institution is valid, the direction to sell being a conversion into personal property, yet the application must be to the use of a person during his life,

or for some shorter term. The trust must therefore be made dependent on the life of the beneficiary; and where the beneficiaries are associations, incorporated or unincorporated, while the lives on which the trust depends are those of two natural persons having no interest in its performance, the limitation cannot be supported. *Downing v. Marshall*, 23 N. Y. 366.

donee of the fund, and could take and control it as the trustee of the poor in the mode prescribed by the will.¹

A gift in trust for charitable purposes which is indefinite and uncertain either as to the subject or object, will not be supported:² as a bequest "to some disposition thereof which my executors may consider as promising most to benefit the town and trade of Alexandria."³ A testator bequeathed one-fourth part of the proceeds arising from the sale of his property to the Tennessee Annual Conference for the Methodist Episcopal Church, for the benefit of institutions of learning under the superintendence of said conference, and to the Missionary Society of the Methodist Episcopal Church, and to be otherwise disposed of as the Tennessee Annual Conference might deem best. It was held that as the bequest was indefinite both

¹ Heuser v. Harris, 42 Ill. 425. If the will sufficiently shows the intention that the devisees shall be trustees merely, and the trust be ineffectual as against the policy of the law, there will be a resulting trust to the heir. *Am. Colonization Soc. v. Gatrell*, 23 Ga. 448; *Lusk v. Lewis*, 32 Miss. 297. Where a person is entitled to an estate devised to a corporation upon its failure to perform a condition, he is not bound by the mere will and pleasure of the devisee as to the time or manner of performing the condition, which must be performed in a reasonable time, according to the nature of the thing to be done. *Hayden v. Stoughton*, 5 Pick. 528.

² *Wright v. Atkyns*, 1 Turn. & Russ. 157; *Wood v. Cox*, 2 Mylne & Craig, 684; *Morice v. Bishop of Durham*, 10 Ves. 521; *Bascom v. Albertson*, 34 N. Y. 610. A bequest "for the establishment of a school at M. for the education of children," is bad for uncertainty. *Atty. Genl. v. Soule*, 28 Mich. 153. The same was held as to a will giving property to the Roman Catholic or-

phans, appointing the bishop of the diocese executor, and giving him power to sell the property and use the proceeds for the benefit of Roman Catholic orphans. *Heiss v. Murphey*, 40 Wis. 276. See *Lindley, ex parte*, 32 Ind. 367; *Grimes v. Harmon*, 35 Id. 198; *De Bruler v. Ferguson*, 54 Id. 549; *Griffith v. State*, 2 Del. Ch. 421; *Fairbanks v. Lamson*, 99 Mass. 533; *Needles v. Martin*, 33 Md. 609. In *Beekman v. Bonsor*, 23 N. Y. 308, COMSTOCK, C. J., said that a charitable gift, definite both in its subject and purpose, and made to a definite trustee, who was to receive the fund and apply it in the manner specified, would be sustained, although void by the rules of law for the reason that the particular objects of the gift or persons to be benefited by it were uncertain; that such a gift was capable of being enforced by judicial sentence, and afforded neither room nor justification for the exercise of the *cy pres* power.

³ *Wheeler v. Smith*, 9 How. 55.

as to persons and objects, it was inoperative and void for uncertainty.¹ A clause in a will was as follows: "Immediately after the death of both of my said grandnieces, then it is my will that my real estate aforesaid shall go to and be held in fee simple by the Infidel Society in Philadelphia, hereafter to be incorporated, and to be held and disposed of by them for the purpose of building a hall for the free discussion of religion, politics, etc." It was held that this remainder limited to a corporation thereafter to be created, was void because there was no devisee competent to take at the time, and the probability that there might be such a corporation during the particular estate for life, was too remote.² A testator residing in Pennsylvania, by his will authorized his executors, or the survivor of them, after the payment of certain annuities and legacies, and after the decease of the testator's wife, to dispose of the residue of the property for the use of such charitable institutions in Pennsylvania and South Carolina as they or he might deem most beneficial to mankind. It was held that this power of appointment being separable and distinct from the duties and trust of the executors as such, and they having died during the lifetime of the wife, the charity could not be carried out.³ McLEAN, J., remarked that

¹ Green v. Allen, 5 Humph. 170.

² Zeisweiss v. James, 63 Pa. St. 465.

³ Fountain v. Ravenel, 17 How. 369.
"Where there is nothing more than the power of appointment conferred by the testator, there is nothing on which a trust, on general principles, can be fastened. The power given is a mere agency of the will, which may or may not be exercised at the discretion of the individual. And if there be no act on his part, the property never having passed out of the testator, it necessarily remains as a part of his estate. To meet such cases and others, the prerogative power of the king in Eng-

land has been invoked, and he, through the chancellor, gives effect to the charity." Ibid., per McLEAN, J. In the same case, TANEY, C. J., said: "These prerogative powers which belong to the sovereign as *parens patriae*, remain with the States. They may legalize charitable bequests within their respective dominions to the extent to which the law upon that subject has been carried in England; and they may require any tribunal of the State which they think proper to select for that purpose, to establish such charities, and to carry them into execution. But the State laws will not authorize the courts

there was not only uncertainty in the beneficiaries of the charity, but there was no expressed will of the testator; that although he intended to speak through his executors or the survivor of them, yet this had become impossible; that if the testator had declared that the residue of his estate should be applied to certain charitable purposes, under the statute of 43 Eliz., or on principles similar to those of the statute, effect must have been given to the bequest as a charity in Pennsylvania. A devise for the foundation of an orphan asylum is not void because of its exclusion of all ecclesiastics, missionaries, and ministers of the gospel from holding or exercising any station or duty in the institution, or even visiting the same; or because it limits the instruction to be given to the orphans to pure morality, general benevolence, and a love of truth, sobriety, and industry.

A corporation cannot act as a trustee in relation to matters in which it has no interest. But when property is devised or granted to it partly for its own use, and partly for the use of others, its power to take and hold the property for its own use, carries with it as a necessary incident the power to execute the part of the trust relating to others.¹ A corporation cannot hold property in trust for

of the United States to exercise any power that is not in its nature judicial; nor can they confer upon them the prerogative powers over minors, idiots, and lunatics, or charities which the English chancellor possesses."

¹ Matter of Howe, 1 Paige Ch. 214. The doctrine that prevailed at an early period that a corporation could not take and hold real or personal estate for the reason that there was a defect of one of the requisites to create a good trustee, viz.: want of confidence in the person, was long since exploded as too artificial. It is now held that where the corporation has a legal capacity to

take real or personal estate, it may take and hold it upon trust in the same manner and to the same extent that a private person may do. If the trust be repugnant to, or inconsistent with, the proper purposes for which the corporation was created, that may be a ground for not compelling the corporation to execute it, but not to declare the trust itself void if otherwise unexceptionable; it will simply require a new trustee to be substituted. *Vidal v. Gerard*, 2 How. 127. In the case of a gift to charitable uses, no neglect, misapplication of funds, or other breach of trust, will give a right to the heirs

any other object than that for which it was created. Thus, a corporation for "the instruction of youth," is not authorized to take charge of funds, as trustee, for the support of missionaries.¹ The supervisors of a county are not competent to be seized as trustees for the use of an individual, or of the inhabitants of a town or village; or to take and hold lands, as supervisors, for any other use or purpose than that of the county which they represent.² An executory bequest, limited to the use of a corporation to be created within the period allowed for the vesting of future estates and interests, is valid. Where the testator gave the residue of his personal property in trust for the endowment of a hospital, directing his trustees to promptly apply to the legislature for an act incorporating the same, and providing that if the charter were not granted within a specified time, the bequest should go in another direction, it was held that the provision in question did not violate the statute against perpetuities.³

A corporation which has expressly accepted in trust a donation to hold and apply it to public and charitable purposes, is not at liberty to renounce it, but must hold and apply it to the objects intended. If the corporation has not accepted the gift, it does not revert to the donor's heirs or residuary legatees, but will be applied to the gen-

at law to call upon a court of equity to declare a resulting trust for themselves; they having no pecuniary or beneficial interest accruing from the non-execution of such a trust. *Sanderson v. White*, 18 Pick. 328.

¹ *Trustees, etc., v. Peaslee*, 15 N. H. 317. The right to hold property in trust for others is not incidental to every corporation, but in general is foreign to the end of its institution. Hence, a corporation cannot be seized of land to the use of another, unless it has authority for that purpose. *Greene*

v. Dennis, 6 Conn. 293. The act of New York, providing that no conveyance, assignment, or transfer of any effects for the use, benefit, or security of any moneyed corporations, shall be valid, unless made to the corporation directly, has reference to moneyed corporations created by the legislature of New York, and not to corporations chartered by a foreign State. *Wright v. Douglass*, 10 Barb. 97.

² *Jackson v. Hartwell*, 8 Johns. 422.

³ *Burrill v. Boardman*, 43 N. Y. 254.

eral purposes of the charity under other suitable persons to be appointed ; and if the general charitable intent of the donor cannot be strictly and literally carried out, a court of equity will cause it to be fulfilled as nearly in conformity with such intent as practicable.¹

§ 169. **Grants to religious corporations.**—The importance given to church membership by some of the colonial and provincial laws, by making it a necessary legal qualification for civil and political office, conferred no power on the church to be exercised in its aggregate capacity. In Massachusetts, the act of 1754, which was revised and substantially re-enacted soon after the adoption of the State constitution, provided that the deacons, for the time being, should be a body corporate, with power to take and hold property for the use of the church, and to transmit it to their successors for the like purpose. “The statute was professedly made for the better recovering of grants and donations to pious and charitable uses, for the better support and maintenance of ministers, and for defraying charges relating to public worship. Two objects were to be accomplished by the statute : one to give all such grants a legal effect and operation, by enabling the grantee to take and hold real and personal property ; the other, that such property should go in succession. But both of these objects would have been as effectually accomplished without the statute, had the churches been deemed corporations or *qua* corporations, with power to take and hold property to them and their successors.”²

In New York, under the statute relative to the incorporation of religious societies, authorizing them to take into their possession all the property of the society, whether the same was given directly to such church or society, or to any other person for their use, and to hold such property the

¹ Am. Academy of Arts & Sciences v. Harvard College, 12 Metc. 582.

² Stebbins v. Jennings, 10 Pick. 172, per SHAW, C. J.

same as if the right or title thereto had been originally vested in the trustees, it was decided that if the grantor, or any other person, held the estate originally in trust for the church or society, the legal estate was transferred to the corporation whenever the requisites of the statute were complied with so as to render it legally competent to take the property in its corporate character.¹

It is said to be settled law in Massachusetts that "property granted originally to a parish, would, upon the incorporation of the parish into a town, pass to, and be held by, the new corporation. It would so remain until, by the creation of a new parish in the town, the latter became separated into two distinct corporations having diverse and independent powers. The property would then revert to the parish to which it was originally granted, unless in the meantime it had been appropriated to the use of the town in its municipal capacity by a vote or other act of the one united corporation. The mere use of the land by the town for occasional and temporary purposes whilst it remained vested in one corporation, would confer no absolute right or title to it upon the town after the separation; nor could

¹ Baptist Church in Hartford v. Withereil, 3 Paige Ch. 296; Trustees of South Baptist Church v. Yates, 1 Hoffm. Ch. 141; 2 N. Y. Rev. Sts., 7th Ed., p. 1658, sec. 4. When a trust in behalf of a religious corporation is wholly nominal, the trust becomes executed by the statute in the *cestui que trust*, who may maintain ejectment for the recovery of the property in his own name, without a previous conveyance from the trustee. Van Deuzen v. Trustees, 3 Keyes, 550; S. C. 4 Abb. App. Decis. 465; Welsh v. Allen, 21 Wend. 147; Nicol v. Walworth, 4 Denio, 385. In New York, under the act of 1813, ch. 60, providing for the incorporation of religious societies, the trustees elected and acting as such, and

their successors, are vested with the custody, possession, management, and legal control of all the property and temporalities belonging to their particular society in the same manner and to the same effect that directors of private corporations are entitled to possession and control of their property. A majority of the corporators or members of the society have no right to take forcible possession of the church building, and hold and control it in opposition to the authority of the trustees. First Meth. Epis. Church v. Filkins, 3 Thomp. & C. 279, per E. D. SMITH, J. See to the same effect, German, etc., Cong. v. Pressler, 17 La. Ann. 127; Green v. Cady, 9 Wend. 414; People v. Runkel, 9 Johns. 147.

any claim of right, by way of adverse use and possession, arise in favor of the town whilst the two bodies were united. So long as they continued blended together, it was impossible for one to gain any rights adversely to the other. But it was competent for the corporation, while exercising the functions, both of a town and parish, to determine how property belonging to it should be appropriated and used."¹

A grant to trustees for the use and benefit of a church to be afterward organized, with no power in them to create the beneficiary or to appropriate the land or the funds arising therefrom for any purpose until such organization, will be upheld, if the church be afterward brought into existence so as to acquire and hold property.² The members of an incorporated religious society having purchased a lot on which to erect a church with money raised by subscription, the conveyance was made to A., B., and C., who were subscribers, without C.'s knowledge. C. declined to sign the deed, for the reason that several of the subscribers had given him notice not to do so. A decree ordering C. to execute the deed was affirmed on appeal.³

In New York, a deed of land to trustees *de facto* of an

¹ Larkin v. Ames, 10 Cush. 198.

² Miller v. Chittenden, 2 Clarke, Iowa, 315. See Second Cong. Soc. v. Waring, 24 Pick. 308; Howard v. Hayward, 10 Metc. 420; Fox v. Union Academy, 6 Watts & Serg. 353.

³ Newmyer's Appeal, 72 Pa. St. 121. Property was conveyed "to trustees in trust for the members of the Methodist Protestant church or society in the village of G., to be held by them and their successors in office for said church or society forever, to the proper use and behoof of said church, agreeably to the rule given in said Methodist Protestant Church Discipline." The book of discipline provided for the election of

trustees for each individual church or society, and made it their duty to hold the property of individual churches in trust for the use and benefit of the members, and provided that the trustees should take care of the church property, with power, when authorized by two-thirds of the male members over the age of twenty-one years, to purchase, build, repair, lease, sell, rent, mortgage, or otherwise to procure or dispose of property, but on no other condition. It was held that the title did not vest in the church or society as a corporation. Meth. Soc. v. Bennett, 29 Conn. 393.

unincorporated religious society, conveys no title to the society.¹ When, however, property is conveyed to individuals for the use of an unincorporated religious society, the persons to whom the conveyance is made stand seized to the use, and when the society receives legal capacity to take and hold real estate, the statute executes the possession to the use, and the estate vests.² In New Jersey, where the members of an unincorporated religious society purchase and take possession of land in behalf of the society, the vendor holds it in trust for the purchasers, and when the society is incorporated it is entitled to a conveyance from him.³ In Massachusetts, an unincorporated religious society, organized and acting in a parochial capacity, has power to receive a grant, and manage and use the estate granted.⁴

§ 170. Title to real estate.—The mere incorporation of tenants in common to enable them to carry on more conveniently a common object does not vest in the corporation a title to the land which had been previously used by the individuals for the same purpose. The title must be conveyed by proper deeds from the individuals to the corporation.⁵ A grant of real estate to an aggregate corporation with perpetual and continued succession carries a fee without reciting that it is to their successors.⁶ “If a lease be

¹ *Bundy v. Birdsall*, 29 Barb. 31.

² *Ref. Dutch Church v. Veeder*, 4 Wend. 494.

³ *African M. E. Church v. Conover*, 27 N. J. Eq. 157.

⁴ *Hamblett v. Bennett*, 6 Allen, 140; *Oakes v. Hill*, 10 Pick. 344.

⁵ *Leffingwell v. Elliott*, 8 Pick. 451. See *Second Congregational Soc. v. Waring*, 24 Pick. 304; *Bangor House Proprietary v. Hinckley*, 12 Me. 385; *Holland v. Cruft*, 3 Gray, 162; *Manahan v. Varnum*, 11 Id. 405.

⁶ *Viner's Abr. Estate L. 3; Overseers*

of the Poor v. Sears, 22 Pick. 122; *Cong. Soc. of Halifax v. Stark*, 34 Vt. 243; *Myers v. Croft*, 13 Wall. 291. “In a grant of lands to a corporation aggregate the word ‘successors’ is not necessary, though usually inserted; for albeit such simple grant be strictly only an estate for life, yet, as that corporation never dies, such estate for life is perpetual or equivalent to a fee simple, and therefore the law allows it to be one.” 2 Blk. Com. 109. “With respect to the capacity of taking land, there is this difference between a cor-

made to a corporation aggregate for the life of the lessor, this is a good estate for life, because the life of the lessor, which is wearing and will determine, is the measure of its continuance. But if a lease be made to a corporation aggregate for their own lives, this is no estate for life, but a fee simple; for the lease being made to them as a body politic, which hath a continual succession and never dies, a lease made to them during their lives is equal to a grant made to them while they continue a body politic, which, by reason of the perpetual succession of its members, is in law looked upon to be forever."¹ Corporations limited in their duration may not only purchase and hold in fee, but they may sell such real estate whenever they find it no longer necessary. They have a fee simple for the purpose of alienation, but only a determinable fee for the purposes of enjoyment. Although on dissolution the reverter is to the original grantor or his heirs, yet they may defeat a reverter by an alienation in fee.²

When the act of incorporation provides that the corpo-

poration aggregate and a corporation sole, that the former has only a corporate capacity, and, therefore, as a collective number of persons, the members of it cannot take lands by their corporate name to them and their heirs, but only to them and their successors. Sole corporations have two capacities—their natural and corporate—and may therefore take either to them and their heirs, or to them and their successors. But the law on this subject respecting the king differs from that respecting any other sole corporation; for though, like the others, he has both a natural and politic capacity, yet in general the politic capacity prevails, and land given to the king and his heirs passes in the same manner as land given to him and his successors; for as applied to the king, the

word 'heirs' includes successors, and in early times the word 'successors' was not added in the king's grants." 1 Kyd on Corp. 74.

¹ Bac. Abr., tit. Corporations, E. See *First Baptist Soc. v. Hazen*, 100 Mass. 322; *School Dist. v. Everett*, 52 Mich. 314.

² *Preston on Estates*, 50, 250; *Rives v. Dudley*, 3 Jones, N. C. Eq. 126; *Nicoll v. N. Y. & Erie R.R. Co.*, 12 Barb. 460; 12 N. Y. 121; *Bingham v. Weiderwax*, 1 Comst. 509; *People v. Munson*, 5 Denio, 389; *Hayward v. Davidson*, 41 Ind. 212; *Crawford v. Longstreet*, 43 N. J. 325; *Coleman v. San Rafael Turnpike Co.*, 49 Cal. 517; *Turnp. Co. v. Illinois*, 96 U. S. 63; *Northern Liberty Market Co. v. Kelly*, 113 Id. 199; *Page v. Heineberg*, 40 Vt. 81. See *ante*, sec. 165.

rate property shall be held as real estate and descend as such, its personalty must be so treated as regards the interests of the stockholders; but it does not follow that the actual legal character of the personal property will be changed as to all other persons.¹ The usual clause in the charter declaring the stock of the corporation personal property relates merely to the nature or character of the property which the stockholders are to be deemed to have in the several shares of the stock of the company as individuals, and not to the character of the property held by the company in its corporate capacity for the benefit of the stockholders.² Where a contract in writing not under seal is entered into by a corporation for a quantity of standing timber, the timber being part of the real estate, the contract only operates as a license to the company to enter upon the land and remove the timber, the title to which only vests in the corporation as fast as removed.³

Grants beneficial to a corporation are presumed to have been accepted.⁴ "The validity of such a grant depends upon the acceptance, not upon the mode by which it is proved. It is no implied condition that the corporation shall perpetuate the evidence of its assent in a particular way."⁵

The title to land being in the corporation, and not in the individual members who are not tenants in common, title to the land cannot be conveyed by one or by any number of the stockholders. Although a member who owned all or a majority of the shares might control the corporation, he could in either case do it only by a vote of the corporation at a meeting held in accordance with the charter.⁶

¹ Cape Sable Co.'s Case, 3 Bland Ch. Pick. 518; Concord Bank v. Bellis, 10 606. Cush. 276; Rotch's Wharf Co. v. Judd,

² Mohawk & Hudson R.R. Co. v. 108 Mass. 224.
Clute, 4 Paige Ch. 384.

³ Cady v. Sandford, 53 Vt. 632.

⁴ Rathbone v. Tioga Nav. Co., 2
Watts & Serg. 74; Ward v. Lewis, 4

⁵ STORY, J., in Bank of U. S. v. Dandridge, 12 Wheat. 60.

⁶ Wheelock v. Moulton, 15 Me. 519; Tileston v. Newell, 13 Mass. 406.

When land situated in a State is claimed by a foreign corporation, it is for the court of the State to construe the charter and determine whether the corporation is authorized by its charter to take or hold the land. With reference to such an inquiry, an adjudication on the subject by the foreign court would only be allowed such weight by the court of the State in which the land lies as the reasons upon which it was founded might give it.¹

§ 171. **Sale of property by religious corporations.**—A religious corporation, which has the title to its real estate, may determine when it shall be sold, and has the exclusive power to enter into contracts for that purpose. In New York, the sole distinction which exists between the authority of such a corporation in this respect and that possessed by other corporations is, that the consent of the court is necessary;² the intention being to protect the corporators from a perversion of their property.³ It has been said that the statute of Elizabeth, restraining ecclesiastical corporations from alienating their real estate, probably became a part of the common law of New York, and that previous to the general law of that State upon the subject, no religious corporation could convey its real estate without an act of the legislature. Since the statute "it cannot be said to be against public policy for such corporations to sell their real estate, for such sales are expressly permitted. Such sales are simply against public policy unless authorized by the proper tribunal in the same way that the sale of lands of infants is against public policy unless authorized by some court."⁴

The only way in which an incorporated religious society

¹ *Boyce v. City of St. Louis*, 29 Barb. 650; *Nicholson v. Leavitt*, 4 Sandf. 276. A corporation may acquire title to land by adverse possession. *Matter of Roman Catholic Soc.*, 4 Lansing, 14.

² L. of N. Y. of 1813, ch. 60, amend-

ed L. of 1879, ch. 117; Rev. Sts. of N. Y., 7th Ed., 1661, 1669.

³ *Cong. Beth. Elohim v. Centr. Presby. Ch.*, 10 Abb. Pr. N. S. 484.

⁴ *Ref. Church v. Schoolcraft*, 65 N. Y. 134.

can divide its real estate and vest a portion in part of the congregation set off from the parent organization, is by an act of the legislature. But an imperfect and invalid conveyance will be sufficient to lay the foundation for an adverse possession.¹

§ 172. **Power to take mortgage security.**—A corporation may take a mortgage on real estate to secure loans or debts made or created in the regular course of its business;² such a power being essential for the prudent conduct of the affairs of corporations as well as of individuals. It was said by the court in a recent case in Illinois, that the policy of taking mortgages on real estate by corporations to secure the payment of debts, had been recognized by the legislature of that State in almost innumerable instances, and that the court could recall no instance where a corporation had been allowed to create a debt, and had at the same time been denied the right to take a mortgage on real estate to secure it.³ So a corporation may, unless restrained by its

¹ *Madison Av. Ch. v. Baptist Ch.*, 73 N. Y. 82.

² *People v. Utica Ins. Co.*, 15 Johns. 358; *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *The Banks v. Poitiaux*, 3 Rand. 136; *Bridge Co. v. Genl. Ins. Co.*, 3 Md. Ch. 418; *Utica Ins. Co. v. Scott*, 19 Johns. 1; *Mann v. Eckford*, 15 Wend. 502; *Farmers' Loan Co. v. Clowes*, 4 Edw. Ch. 575; 3 Sandf. Ch. 339; 3 Comst. 470; *Trenton Banking Co. v. Woodruff*, 1 Green, N. J. Ch. 117; *Baird v. Bank of Washington*, 11 Serg. & Rawle, 411; *Battershall v. Davis*, 31 Barb. 323; *Bennett v. Union Bank*, 5 Humph. 612; *Morris v. Way*, 16 Ohio, 469; *Fowler v. Scully*, 72 Pa. St. 456; *Woods v. People's Nat. Bank*, 83 Id. 57. But see *Kansas Valley Nat. Bank v. Rowell*, 2 Dillon, 371; *Mathews v. Skinker*, 62 Mo. 329.

³ *Stevens v. Pratt*, 101 Ill. 206. A bank was prohibited by its charter

from purchasing land not required for its business, or mortgaged or conveyed to it for debts, or purchased by it on judgments. The bank held a mortgage on some of several tracts of land which were previously mortgaged to the plaintiff, and, at the foreclosure sale of the plaintiff's mortgage, the bank bid in a lot not covered by its mortgage, in order to prevent the property from being sacrificed, the plaintiff receiving the purchase money therefor, and afterward levying and selling the same lot on a judgment against the mortgagor. It was held that the bank obtained no title to the lot purchased by it at the foreclosure sale, and that the plaintiff and the bank being competitors at the sale, he had a right to contest the validity of the sale to the bank. *Russell v. Topping*, 5 McLean, 194. Where the charter required that sales of property under mortgages held by

charter, take a mortgage or deed of trust on real estate to secure anticipated advances or liabilities.¹

§ 173. **Mortgaging corporate property.**—Power in a corporation to sell, includes a power to mortgage, even under the statute of uses, strictly construed. But the superadded words, “dispose of,” leave no doubt of the existence of an intent to give the corporation power to part with its real estate by any voluntary act without regard to its operation.² Express authority given to a corporation to mortgage its property, will not prevent its giving security by a pledge;³ or power to mortgage for a special purpose, deprive it of the right to mortgage for other purposes.⁴ Authority to mortgage which is lacking, may be conferred by the legislature after the corporation has given mortgage security.⁵ The right to buy or sell real estate, or to borrow money,

the corporation must be made in the county where the property was situated, and the decree of foreclosure described the property as situated in one county and directed a sale there, whereas it was situated in another county, it was held that the decree could not be impeached collaterally, but only by appeal. *Fuller v. Van Geesen*, 4 Hill, 171.

¹ *Farmers' Loan Co. v. McKinney*, 6 McLean, 1; *Crocker v. Whitney*, 71 N. Y. 161; *Peru Bridge Co. v. Hendricks*, 18 Ind. 11. But see *Kansas Valley Nat. Bank v. Rowell*, *supra*; *Woods v. People's Nat. Bank*, *supra*.

² *Gordon v. Preston*, 1 Watts, 385; *McAllister v. Plant*, 54 Miss. 106. Where an act was passed by the legislature of New Jersey, making it lawful for the united railroad and canal companies of that State, by and with the consent of two-thirds in interest of the stockholders of each in writing, duly authenticated by affidavits filed in the office of the secretary of state, to consolidate their capital stocks, or to consolidate with any other railroad or

canal company in the State, or otherwise, with which they were or might be identified in interest, or whose works should form with their own continuous or connected lines, or to make such other arrangements for connection or consolidation of business with any such company or companies by agreement, contract, lease, or otherwise, as to the directors of said united companies might seem expedient, it was held that no power was given to lease to a company out of the State. *Black v. Del. & Raritan Canal Co.*, 24 N. J. Eq. 455, reversing S. C. 22 Id. 130.

³ *Uncas Nat. Bank v. Rith*, 23 Wis. 339.

⁴ *Allen v. Montgomery R.R. Co.*, 11 Ala. 437; *Mobile R.R. Co. v. Talman*, 15 Id. 472; *Jones v. Guaranty, etc., Co.*, 101 U. S. 622.

⁵ *White Water Valley Canal Co. v. Valette*, 21 How. 414; *Richards v. Merrimack, etc., R.R. Co.*, 44 N. H. 127; *Portland, etc., R.R. Co. v. Kennebec, etc., R.R. Co.*, 59 Me. 9; *Shaw v. Norfolk R.R. Co.*, 5 Gray, 162.

implies the power to mortgage the corporate property to secure debts.¹ "Borrowing is one of those powers which directors may have either as expressly given, or as implied from the nature of the business. When expressly given, it may be in so many words, or by necessary deduction from general powers of management conferred upon them. The authority may be to borrow by way of loan simply, or by mortgaging the funds and other property of the company, whether the existing assets only, or future assets as well, that is to say, book debts accruing though not yet due."² The principle that a person cannot grant a thing he does not have, has no application to a mortgage of present property, and such also as may be thereafter acquired, when no rule of law is infringed, or rights of a third party prejudiced.³ By the civil law, a mortgage may cover the

¹ Jackson v. Brown, 5 Wend. 590; Cent. Gold Mining Co. v. Platt, 3 Daly, 263; Thompson v. Lambert, 44 Iowa, 239; Watts' Appeal, 78 Pa. St. 370; Susq. Bridge Co. v. Genl. Ins. Co., 3 Md. 305; Taber v. Cincinnati R.R. Co., 15 Ind. 459; Coe v. Johnson, 18 Id. 218; Trustees v. Shulze, 61 Id. 511; Savannah, etc., R.R. Co. v. Lancaster, 62 Ala. 555; Taylor v. Agr., etc., Assoc., 68 Id. 229; Burt v. Rattle, 31 Ohio St. 116; McAllister v. Plant, *supra*; Aurora Agr. Soc. v. Paddock, 80 Ill. 263; West v. Madison County Agr. Board, 82 Id. 205; Miller v. Chance, 3 Edw. Ch. 399; Barry v. Merchants' Exchange Co., 1 Sandf. Ch. 280; Burr v. McDonald, 3 Gratt. 206; Pennock v. Coe, 23 How. 117; King v. Merchants' Exchange Co., 5 N. Y. 547; Curtis v. Leavitt, 15 Id. 9; Leavitt v. Blatchford, 17 Id. 521; Parish v. Wheeler, 22 Id. 494; Nelson v. Eaton, 26 Id. 410; Bardstown, etc., R.R. Co. v. Metcalfe, 4 Metc. Ky. 199; Richards v. Merri-mack, etc., Co., *supra*; Robins v. Embury, 1 Smed. & Marsh Ch. 207; Aus-

tralian, etc., Steamship Co. v. Mounsey, 4 K. & J. 733; *In re Patent File Co.*, L. R. 6, Ch. 83. See Tripp v. Swanzy Paper Co., 13 Pick. 291.

² Green's Brice's Ultra Vires, 2d Am. Ed., 499, 500. "Under ordinary circumstances, and with ordinary powers, a corporation can mortgage only its assets and property. But by legislative authority it may mortgage every incident connected with it; its special powers, its franchises." *Ib.* 628 *note*.

³ *In re Marine Mansions Co.*, L. C. 4, Eq. 601; Bloomer v. Union Coal, etc., Co., 16 Id. 383; Willink v. Andrews, Jr., R. 16, C. L. 201; Pennock v. Coe, 23 How. 117; Williamson v. New Alb., etc., R.R. Co., 1 Biss. 198; U. S. v. New Orleans R.R. Co., 12 Wall. 362; Shaw v. Bill, 95 U. S. (5 Otto) 15; Benjamin v. Elmira R.R. Co., 49 Barb. 441; Seymour v. Canandaigua, etc., R.R. Co., 25 Id. 284; Butler v. Rahm, 46 Md. 541; Pierch v. Milwaukee, etc., R.R. Co., 24 Wis. 551; Morrill v. Noyes, 56 Me. 458; Coe v. Brown, 22 Ind. 252; Meyer v.

subsequently acquired property of the mortgagor.¹ Mortgages of the future stock of trading and manufacturing corporations have been sustained at common law.² Even where the strict rule against the mortgaging of subsequently acquired personal property is enforced, if the mortgage purport to cover such property, and the mortgagee take possession with the assent of the mortgagor, before another title attaches, he will hold as pawnee. And in mortgages of real estate, buildings, and other things which are annexed to the land after the mortgage, are deemed acccessions to the original subject.³ Future calls cannot be mort-

Johnston, 53 Ala. 324; *Stevens v. Watson*, 4 Abb. Ct. of App. Decis. 302; *Fisk v. Potter*, 2 Id. 138; Philadelphia, etc., R.R. Co. v. Woelper, 64 Pa. St. 366; *Dunham v. Isett*, 15 Iowa, 284; *Williamson v. N. J., etc.*, R.R. Co., 29 N. J. Eq. 311. It is a general rule of the common law that nothing can be mortgaged that is not in existence, and does not belong to the mortgagor. *Tapfield v. Hillman*, 4 M. & G. 240; *Lunn v. Thurston*, 1 M. G. & S. 383; *Winslow v. Merchants' Ins. Co.*, 4 Metc. 306; *Jones v. Richardson*, 10 Id. 488; *Moody v. Wright*, 13 Id. 17.

¹ Domat, Pt. 1, b. 3, tit. 1, arts. 5, 7.

² *Mitchell v. Winslow*, 2 Story, 630; *Holly v. Brown*, 14 Conn. 255; *Abbott v. Goodwin*, 20 Me. 408.

³ *Pettingill v. Evans*, 5 N. H. 54; *Pierce v. Emery*, 32 Id. 484. In *Langton v. Hasten*, 1 Hare Ch. 549, the mortgage security was the assignment of the ship *Foxhound*, then on her voyage to the South seas, together with all and singular her masts, etc., "and all oil and head matter and other cargo which may be caught or brought home on the said ship on and from her then present voyage." The cargo was levied on by a judgment creditor on the arrival of the ship at home. A bill was

filed to have the mortgage declared a good and valid security for the moneys advanced, and that the complainants be entitled to the benefit of the security in preference to the judgment creditor. The vice-chancellor said: "Is it true that a subject to be acquired after the date of a contract cannot in equity be claimed by a purchaser for value under the contract? It is impossible to doubt that, for some purposes at least, by contract, an interest in a thing not in existence at the time of the contract may in equity become the property of the purchaser for value. I cannot, without going in opposition to many authorities which have been cited, throw any doubt upon the point that Bixme, the contracting party, would be bound by the assignment to the plaintiffs." In *Tapfield v. Hillman*, 7 Jur. 771, TINDALL, Ch. J., was inclined to the opinion that, even at law, a mortgage security of future acquisitions might have effect given to it if the terms indicated an intent to comprehend them. *Chapman v. Weimer*, 4 Ohio, 481, was a case at law, and it was held that the mortgage attached after the property was acquired from the time the right was asserted by the mortgagee.

gaged;¹ but calls already made, although the time for payment has not yet arrived, may be assigned as security for existing indebtedness when the corporation has a general authority to borrow or its business cannot be continued without raising money.² Future net earnings and profits may be mortgaged,³ and future advances be secured by a mortgage of the corporate property.⁴ A corporation may mortgage its lands situated in another State than that of its creation unless prohibited by law.⁵ The omission to specify a thing in a mortgage along with other things which are enumerated does not exclude it if any of the enumerated things could be of no use without it. The description of property mortgaged by a railroad company was all the present and future to be acquired property of the company, including the right of way and land, with the superstructure and rails and other materials, bridges, viaducts, culverts, fences, depot grounds and buildings, tolls, and income. It was held that as the things specified would be of little value to the mortgagees without the rolling stock, that must also be regarded as included.⁶ Notwithstanding so much of a mortgage as embraces a portion of the property of a corporation is inoperative and void, yet if it is valid in relation to a separate and independent portion, the latter will be upheld.⁷ Where a railroad company being duly authorized issued bonds for borrowed money and gave a mortgage on the road and its franchises executed

¹ *In re* British Provident Life & Fire Assu. Co., 4 De G. J. & S. 407; *King v. Marshall*, 33 Beav. 565; *In re* Sankey Brook Coal Co., L. R. 10, Eq. 381; *Bank of South Australia v. Abrahams*, L. R. 6, P. C. 265.

² *In re* Humber Iron Works Co., 16 W. R. 474, 667; *In re* Sankey Brook Coal Co., L. R. 9, Eq. 721; *In re* Life Assu. Co., L. R. 10, Eq. 312; *King v. Marshall*, *supra*.

³ *Pullan v. Cincinnati, etc., R.R. Co.*,

5 Biss. 237; *Dunham v. Isett*, 15 Iowa, 284; *State v. Northern Cent. R.R. Co.*, 18 Md. 193.

⁴ *Crewer, etc., Mining Co. v. Will-yams*, 14 L. T. N. S. 93; *Conrad v. Atlantic Ins. Co.*, 1 Pet. 386.

⁵ *Bassett v. Monte Christo, etc., Mining Co.*, 15 Nev. 293.

⁶ *Pullan v. Cincinnati, etc., R.R. Co.*, 4 Biss. 35; *Shaw v. Bill*, 95 U. S. 10. See *Smith v. McCullough*, 104 U. S. 25.

⁷ *Hendee v. Pinkerton*, 14 Allen, 381.

by the president of the company in his name as president, but signed by him in his name individually, it was held that although both he and the directors who voted that the mortgage should be given, intended that it should be executed by the company and supposed that it was so executed, which, owing to technical defects, was not the case, yet, as between the corporation and mortgagees, it operated in their favor as an equitable mortgage.¹ When a mortgage given by a railroad company embraces the rolling stock of the company as well as the track, land occupied for buildings, superstructure, etc., judgments recovered against the company by creditors subsequent to the execution of the mortgage and executions levied on the property, are not a lien superior in law to the prior claim of the mortgagees.² But the latter take after acquired property subject to any lien on it existing when the property came into the hands of the mortgagor.³

When the property of a railroad company is mortgaged, it belongs to the company, subject to the mortgage lien. Whatever interest remains due after the lien is discharged, is the property of the corporation, and when the bonds secured by the mortgage are paid, the residue becomes a trust fund for the benefit of creditors. The bondholders may exact the whole amount of the bonds, principal and interest; or they may, if they see fit, accept a percentage

¹ *Miller v. Rutland & Washington R.R. Co.*, 36 Vt. 452. There was no order or resolution of the board of trustees of a religious society authorizing a mortgage. All of the trustees except one, who had resigned, executed it, and, in doing so, they acted as a board, and although all who signed the mortgage were not present at the same time, yet a majority of them were present part of the time when it was being executed. It was held sufficient. *South Baptist Soc. v. Clapp*, 18 Barb. 35.

² *Farmers' Loan & Trust Co. v. Hendrickson*, 25 Barb. 484.

³ *Williamson v. R.R. Co.*, 29 N. J. Eq. 311; *U. S. v. New Orleans R.R. Co.*, 12 Wall. 362; *Scott v. R.R. Co.*, 6 Biss. 534. A bank having obtained a lien upon property by judgment may purchase at execution sale under the judgment such property of the defendant as may be necessary to secure its claim, although prohibited by statute from purchasing and holding real estate. *Ingraham v. Speed*, 30 Miss. 410.

as a compromise in full discharge of the claims. But whenever the lien is legally discharged, the property embraced in the mortgage, or so much of it as remains, belongs to the corporation. Where there was an agreement between the mortgagees and stockholders of an insolvent railroad company, by which the mortgage bondholders discharged their lien for eighty-four per cent. of the full amount, and the stockholders were to have the residue of the proceeds of a sale of the corporate property, it was held fraudulent and void as against the general creditors, notwithstanding if there had been a regular foreclosure, independently of any arrangement between the bondholders and stockholders, the entire proceeds would have belonged to the latter.¹

In case of the failure of a railroad company to pay its mortgage debt, it has been said that the property, if worth much more than the amount of the debt and interest, "should be leased at public auction for the shortest term that will bring the amount of the accruing interest and principal, as the same shall become due. If no one will take it for a term of years, it should be sold absolutely. The lessee or purchaser should be required to give bonds with good security, personal or real, to be approved by the court, for the purchase money, including the accruing interest and principal of the mortgage bonds; and a lien on the property or term should be reserved as additional security. If the property should be leased, the lessee should be required to give a covenant, with good security, to be approved by the court, to keep in repair the road, cars, and other property not consumable by use, such as fuel and oil, and return the same to the company at the end of the term in as good condition as it may be in when received; and, to prevent future controversy with reference thereto, the court, before ordering a lease, should cause an inventory

¹ Railroad Co. v. Howard, 7 Wall. 392.

to be made by one or more commissioners of said property, its value, condition, etc., which should be filed in the cause, and be declared in the decree ordering the lease, to be conclusive evidence of the condition and value of said property at the time of the lease.”¹

§ 174. **Right of eminent domain.**—Authority to appropriate and control private property for public use, is an inherent element of sovereignty demanded by the necessity of the case, and the highest considerations of the public welfare ; the government simply resuming the possession of that to which it has the ultimate title, and of which it has surrendered the present possession, subject to the condition that such resumption may be made whenever the occasion shall arise.² This power of eminent domain belongs to the United States as well as to the several States of the Union, and the only requisite for its exercise is the existence of the necessity, and the payment of just compensation for the private property taken.³ Thus, authority has been given by law, not only to the agents of the government,

¹ BULLITT, J., in *Bardstown, etc.*, R.R. Co. v. Metcalfe, 4 Metc. Ky. 199.

² *De Varaigne v. Fox*, 2 Blatchf. 95 ; *Jones v. Walker*, 2 Paine, 688 ; *Patterson v. Miss.*, etc., *Boom Co.*, 3 Dillon, 465 ; *Rensselaer & Saratoga R.R. Co. v. Davis*, 43 N. Y. 137 ; *Eastern R.R. Co. v. Boston & Me. R.R. Co.*, 111 Mass. 125 ; *Am. Print Works v. Lawrence*, 3 Zab. N. J. 9 ; *Brown v. Beatty*, 34 Miss. 227 ; *Weir v. St. Paul, etc.*, R.R. Co., 18 Minn. 155 ; *Baring v. Erdman*, 14 Hazard's Pa. Reg. 129 ; *Cent. Branch, etc.*, R.R. Co. v. *Atchison, etc.*, R.R. Co., 28 Kansas, 453 ; *Boom Co. v. Patterson*, 98 U. S. 403 ; *U. S. v. Jones*, 109 Id. 513. “This power, denominated the eminent domain of the State, is, as its name imports, paramount to all private rights vested under the government, and these

last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise. The Constitution of the United States, although adopted by the sovereign States of this Union, and proclaimed in its language as the supreme law for their government, can by no rational interpretation be brought in conflict with this attribute of the States ; there is no express delegation of it by the constitution, and it would imply an incredible fatuity in the States to ascribe to them the intention to relinquish the power of self-government and self-preservation.” DANIEL, J., in *West River Bridge Co. v. Dix*, 6 How. 507, aff'g 16 Vt. 446.

³ *Secombe v. R.R. Co.*, 23 Wall. 108 ; *U. S. v. Block*, 3 Biss. 208 ; *Kohl v. U. S.*, 91 U. S. 367.

but to corporations as well foreign as domestic, and even to individuals, to take private property for the purpose of constructing public highways, canals, and railroads, making wharves and basins, establishing ferries, draining swamps, and conveying water to cities and villages;¹ and the power has sometimes been delegated by general statutes applicable to corporations organized pursuant to them.² Whether the public exigencies require that private property shall be taken, is to be exclusively determined by the law-making power;³ but what constitutes a public use is a question for the courts.⁴

In the exercise of the right of eminent domain, the legislature may authorize shares in corporations, and corporate franchises to be taken for public uses, upon just compensation, the title to this species of property being no more secure against invasion when the public necessity requires it, than the ownership of real estate. This principle does not tend to impair the obligation of contracts, but rests on the basis that public convenience and necessity are of para-

¹ *Beekman v. Saratoga, etc., R.R. Co.*, 3 Paige Ch. 73; *Rensselaer & Saratoga R.R. Co. v. Davis*, *supra*; *In re Fowler*, 53 N. Y. 60; *R.R. Co. v. Kip*, 46 Id. 546; *Johnson v. Utica Waterworks*, 67 Barb. 415; *Patterson v. Miss., etc., Boom Co.*, 3 Dillon, 465; *In re Mt. Washington R.R. Co.*, 35 N. H. 134; *Hildreth v. City of Lowell*, 11 Gray, 345; *Barrington v. Neuse River, etc., Co.*, 69 N. C. 165; *Matter of Townsend*, 39 N. Y. 171. See *Reddall v. Bryan*, 14 Md. 444; *Hartwell v. Armstrong*, 19 Barb. 166; *Anderson v. Kerns Draining Co.*, 14 Ind. 199; *Gilmer v. Lime Point*, 19 Cal. 229; *Williams v. School District*, 33 Vt. 271; *Dingley v. Boston*, 100 Mass. 544; *Matter of Commrs. of Central Park*, 63 Barb. 282. There is nothing in the nature of the power of eminent domain which forbids its exercise by an indi-

vidual when delegated for a purpose of a public nature. There have been frequent instances of its exercise by individuals under the law of England, and of some of the States of the Union.

² *Buffalo, etc., R.R. Co. v. Brainard*, 9 N. Y. 100.

³ *Talbot v. Hudson*, 16 Gray, 417; *Tide Water v. Coster*, 18 N. J. Eq. 518; *People v. Smith*, 21 N. Y. 595. See *In re N. Y. Cent. R.R. Co.*, 66 N. Y. 407; *Matter of Cooper*, 28 Hun, 515.

⁴ *People v. Salem*, 20 Mich. 452; *Waterworks Co. v. Burkhart*, 41 Ind. 364; *Speer v. Blairsville*, 50 Pa. St. 150; *Matter of Deansville Cemetery Assoc.*, 66 N. Y. 569; *Chicago, etc., R.R. Co. v. Lake*, 71 Ill. 333; *Tyler v. Beecher*, 44 Vt. 649; *Thompson v. Androscoggin, etc., Improvement Co.*, 58 N. H. 108. See *Fertilizing Co. v. Hyde Park*, 97 U. S. 659.

mount importance and obligation. By the grant of a franchise to individuals for one public purpose, the legislature does not debar itself from giving to others new and paramount rights and privileges, although it may be necessary to appropriate a franchise previously granted. If, in such cases, suitable and adequate provision is made by the legislature for the compensation of those whose property or franchise is injured or taken away, there is no violation of public faith or private right. The obligation of the contract created by the original charter is thereby recognized as the property of individuals, and the rights acquired by them under it, like other property appropriated for public uses, form proper subjects for indemnity in damages. Unless this were the rule, useful public improvements might be prevented by legislative grants, which, though wise and expedient in their day, had become obsolete.¹ Where a corporation was authorized by the act creating it, to build a bridge across the Connecticut River from Enfield to Suffield, and to collect certain tolls, and the charter recited that "no person or persons shall have liberty to erect another bridge anywhere between the north line of Enfield and the south line of Windsor," it was held that the bridge company had the same and no greater right to be protected in the enjoyment of its property and franchises as other citizens, and that the legislature had the same right, by vir-

¹ *West River Bridge Co. v. Dix*, 6 How. 507; *Richmond, etc., R.R. Co. v. Louisa R.R. Co.*, 13 Id. 71; *Milner v. N. J. R.R. Co.*, 6 Am. L. Reg. 6; *Boston, etc., R.R. Co. v. Salem, etc., R.R. Co.*, 2 Gray, 1; *Bagkus v. Lebanon*, 11 N. H. 19; *Bellona Co.'s Case*, 3 Bland Ch. 442; *Sixth Av. R.R. Co. v. Kerr*, 72 N. Y. 330; *Metropolitan City R.R. Co. v. Chicago, etc., R.R. Co.*, 87 Ill. 317; *Matter of Towanda Bridge Co.*, 91 Pa. St. 216; *Pennsylv. R.R. Co.'s Appeal*, 93 Id. 150; *Phila., etc., R.R. Co.'s Appeal*, 102 Id. 123; *Northern Pacific R.R. Co. v. St. Paul, etc., R.R. Co.*, 1 McCrary, 302; *Greenwood v. Freight Co.*, 105 U. S. 13; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 Id. 656; *Black v. Del. & Raritan Canal Co.*, 22 N. J. Eq. 130; s. c. 24 Id. 455. See *Lake Shore, etc., R.R. Co. v. N. Y., Chicago, etc., R.R. Co.*, 8 Fed. Rep. 858; *Lake Pleasanton Water Co. v. Contra Costa Water Co.*, 67 Cal. 659; *Eel River, etc., R.R. Co. v. Field*, Ib. 429.

tue of its power of eminent domain, to appropriate such property to public use, when necessary, and upon the same terms.¹ The right of eminent domain may be exercised over property of the United States not reserved or held by the government for specified national purposes.² But, although a franchise is property, and, as such, may be taken by a corporation under the right of eminent domain, yet in favor of such right there can be no implication, unless it arises from a necessity so absolute that without it the grant itself will be defeated. It must also be a necessity which arises from the very nature of things, and over which the

¹ *Enfield Bridge Co. v. Hartford & New Haven R.R. Co.*, 17 Conn. 40, 454. See *New York, etc., R.R. Co. v. Boston, etc., R.R. Co.*, 36 Conn. 196; *Bridge Co. v. Clarksville*, 1 Sneed, Tenn. 176; *Railway v. Railway*, 30 Ohio St. 604; *Baltimore, etc., T. Co. v. Union R.R. Co.*, 35 Md. 224; *Sixth Av. R.R. Co. v. Kerr*, 72 N. Y. 330; *Metrop. City R.R. Co. v. Chicago, etc., R.R. Co.*, 87 Ill. 317. In an early case in Alabama, it was held that the grant of a ferry did not prevent the legislature from chartering a toll-bridge near the ferry, without making any provision for compensation to the owner of the ferry. *Dyer v. Tuscaloosa Bridge Co.*, 2 Porter, 296. The Supreme Court of New Hampshire held that the grant of a ferry did not prevent the legislature from granting to another person the exclusive right of erecting a toll-bridge within certain limits which included the place where the ferry was situated. The court expressed the opinion that were there no terms of exclusion in the grant of the bridge, another bridge might be authorized within the same limits. There being an exclusive grant of the bridge in that case, the court decided that the legislature could not authorize the erection of another bridge without provision for the compensation

of the first grantee. *Piscataqua Bridge v. N. H. Bridge*, 7 N. H. 35, 59. A charter, authorizing the construction of a toll-bridge across a river, or arm of the sea, and providing that it shall not be lawful for any one to erect or maintain a bridge or ferry in or near the same place, is not a covenant or grant that a similar privilege shall not be conferred on others. *Thompson v. N. Y. & Harlem R.R. Co.*, 3 Sandf. Ch. 625; *Mohawk Bridge Co. v. Utica, etc., R.R. Co.*, 6 Paige Ch. 554. The right to erect a bridge over navigable water is not a separate right, independently of the franchise, to establish the way, but a part of the franchise, and within the grant, because it is necessary to the enjoyment of it. When the right to take toll ceases by the lawful taking and condemnation of the way to the public use, the bridge, together with the fixtures necessarily incident to the use of the way, passes with it; and the owners of the bridge are only entitled to compensation for the loss of the franchise, and not for the value of the bridge. *Cent. Bridge Corp. v. Lowell*, 15 Gray, 106.

² *U. S. v. Bridge Co.*, 6 McLean, 517; *Ormerod v. N. Y., West Shore, etc., R.R. Co.*, 18 Fed. Rep. 370.

corporation has no control. It is obvious that to permit the extinction of franchises on the plea of necessity created by a corporation for its own convenience, or economy, would subject important legislative grants to destruction, at the will of the holder of the latest franchise.¹ Of course, to give a legislative grant the effect of a conveyance to private uses of land the proprietorship of which is in the State, it must clearly appear that the legislature intended to make a grant of that character and description, or that the use of the public property is necessary to the enjoyment of the franchises which are granted.² When power is given to acquire an interest in land for the exclusive purpose of exercising a franchise, and particularly when, to acquire such an interest, there is a delegation of the power of eminent domain, the interest cannot be separated from the use to which alone it can be applied, and if the franchise cannot be conveyed, neither can the interest in real estate with which it is connected.³

The right of eminent domain can only be exercised for a public purpose supposed and intended to benefit the public; and after the right has been exercised, the use of the property must be held in accordance with and for the purposes which justified its taking.⁴ It is sufficient that the object

¹ Pennsylvania Co.'s Appeal, 93 Pa. St. 150; *Inhab. of Springfield v. Conn. River R.R. Co.*, 4 Cush. 63; *In re Boston & Alb. R.R. Co.*, 53 N. Y. 574; *Boston, etc., R.R. Co. v. Lowell, etc., R.R. Co.*, 124 Mass. 368; *Matter of N. Y., etc., R.R. Co.*, 77 N. Y. 248. See 20 Hun, 201. When the legislature attempts "to take the property of one man which he has fairly acquired, and the general law protects, in order to transfer it to another, even upon a complete indemnification, it will naturally be considered as an extraordinary act of legislation, which ought to be viewed with jealous eyes, examined

with critical acuteness, and scrutinized with all the severity of legal exposition. An act of this sort deserves no favor; to construe it liberally, would be sinning against the rights of property. In England, it has been said that all courts have, for obvious reasons, at all times, construed such legislative enactments most strictly." *Binney's Case*, 2 Bland Ch. 99.

² *Stevens v. Paterson & Newark R.R. Co.*, 34 N. J. 532.

³ *Coe v. Columbus, Piqua & Ind. R.R. Co.*, 10 Ohio St. 372.

⁴ *Lance's Appeal*, 55 Pa. St. 16; *Nesbitt v. Trumbo*, 39 Ill. 110; *Crear*

is a public benefit to a district, or to a particular community.¹ In the construction of a railroad by a private corporation under the authority of the legislature, for the public accommodation, there is a mingling of both public and private benefit and a public use, for which private property may be lawfully taken.² Such a road is deemed a public highway, whether made by the government, or by a corporation, or even by individuals, who derive the power to construct it from legislative grant. Though the ownership is private, the use is public. So, turnpikes, bridges, ferries, and canals, although made by individuals under public grants, or by companies, are regarded as *publici juris*.³ The use of a street by a railroad is one of the modes of enjoying a public easement, and the only restriction upon its application is, that the use to be made of streets must not be incompatible with, or subversive of, the ends for which they were established.⁴ A contract between railroad and telegraph companies, by which the former attempts to vest in the latter the exclusive right to establish lines of telegraphic communication along the roadway, is against public policy in tending to create a monopoly, and an unauthorized conveyance of property condemned to public use.⁵

When private property is demanded by a corporation under the power of eminent domain, based upon an alleged prospective increase of its business, which will require enlarged accommodations, it must be established beyond reasonable doubt that such increase will occur. The acquisi-

v. Crossly, 40 Id. 175; Osborn v. Hart, 24 Wis. 89; Bankhead v. Brown, 25 Iowa, 540; Memphis Freight Co. v. Memphis, 4 Cold. Tenn. 419; Brown v. Beatty, 34 Miss. 227; Bonaparte v. Camden & Amboy R.R. Co., Baldw. 205.

¹ Bloomfield Gas Light Co. v. Richardson, 63 Barb. 437.

² Walther v. Warner, 25 Mo. 277.

³ Olcott v. Supervisors, 16 Wall. 678.

⁴ Drake v. Hudson River R.R. Co., 7 Barb. 508; Chapman v. Albany & Schenectady R.R. Co., 10 Id. 360; Williams v. N. Y. Centr. R.R. Co., 18 Id. 222.

⁵ Western Union Tel. Co. v. Am. Union Tel. Co., 65 Ga. 160.

tion of land by a railroad company for purposes of speculation or sale, or to prevent interference by competing lines, or methods of transportation, or in aid of collateral enterprises remotely connected with the operating of the road, although they may increase its revenue, are not such objects as justify the condemnation of private property.¹ Although, however, the right of eminent domain being in derogation of common right, is not to be extended by implication, and the act conferring the power must be strictly complied with, yet a statute granting the power should not be construed so literally or strictly as to defeat the evident purpose of its enactment. If the power is doubtful, after all reasonable intendments in its favor, the doubt will be solved adversely to the claim of power.² The purposes for which lands may rightfully be condemned to the uses of a railroad company, are not necessarily confined to those needful for the track. A manufactory of cars, or dwellings for operatives, would not be included in the right to take land required for the road.³ But passenger depots, convenient and proper places for keeping cars and locomotives when not in use, and for the receipt and delivery of freight, would be indispensable to the accomplishment of the general purposes of the corporation.⁴ So, land may be taken for cattle-yards, repair-shops, turnouts, for the deposit of wood and lumber transported, and also for additional tracks rendered necessary by an increase of business;⁵ and it will

¹ *Rensselaer & Saratoga R.R. Co. v. Davis*, 43 N. Y. 137; *Stevens v. Erie R.R. Co.*, 21 N. J. Eq. 259; *Cleveland & Pittsburgh R.R. Co. v. Spear*, 56 Pa. St. 325.

² *Zack v. Pa. R.R. Co.*, 25 Pa. St. 394; *Lackland v. Northern Mo. R.R. Co.*, 31 Mo. 180; *State v. Jersey City*, 25 N. J. 309; *Van Wickle v. R.R. Co.*, 14 Id. 162; *Gilmer v. Lime Point*, 19 Cal. 47; *Locks v. Nashua & Lowell R.R. Co.*, 104 Mass. 1.

³ *Eldridge v. Smith*, 34 Vt. 484.

⁴ *N. Y. & Harlem R.R. Co. v. Kip*, 46 N. Y. 546.

⁵ *N. Y. Cent. R.R. Co. v. Metrop. Gas Light Co.*, 63 N. Y. 326; *Cumberland Valley R.R. Co. v. McLanahan*, 59 Pa. St. 23; *State v. Mansfield*, 23 N. J. 510; *Chicago, etc., R.R. Co. v. Wilson*, 17 Ill. 123; *Hannibal, etc., R.R. Co. v. Muder*, 49 Mo. 165. See *Kier v. Boyd*, 60 Pa. St. 33.

not invalidate the proceedings, that other land equally advantageous can be obtained at private sale.¹ A railroad company may divert a stream of water from the line of its road;² or appropriate springs contiguous thereto, when needful water cannot be otherwise secured;³ and, under a general power to take land for its road, it may cross public highways.⁴

Although private property cannot be lawfully taken for public use without due notice to the owner of the property, yet if he be not known, and cannot be ascertained, a general public notice to all persons interested will be sufficient.⁵

Just compensation for the private property taken is indispensable;⁶ and this should be ascertained and paid before the land is permanently occupied;⁷ unless the owner

¹ N. Y. & Harlem R.R. Co. v. Kip, *supra*.

² Baltimore, etc., R.R. Co. v. Magruder, 34 Md. 79.

³ Strohecker v. Ala., etc., R.R. Co., 42 Ga. 509.

⁴ State v. Montclair R.R. Co., 35 N. J. 328.

⁵ Hildreth v. City of Lowell, 11 Gray, 345; Lohman v. St. Paul, etc., R.R. Co., 18 Minn. 174. See Anderson v. Tubeville, 6 Cold. Tenn. 150; Chicago, etc., R.R. Co. v. Smith, 78 Ill. 96; Grand Rapids, etc., R.R. Co. v. Alley, 34 Mich. 16, 18. Mortgagees of the land taken are entitled to notice. Severin v. Cole, 38 Iowa, 463; Martin v. London, etc., Co., L. R. 1, Eq. 145; but not judgment creditors of owners. Watson v. N. Y., etc., R.R. Co., 47 N. Y. 157; nor a mere trustee of an equitable interest in the land. McIntyre v. Easton, etc., R.R. Co., 26 N. J. Eq. 425. As to sufficiency of notice, see *In re* Corporation of Huddersfield, L. R. 10, Ch. App. 92; Burns v. Multonah R.R. Co., 15 Fed. Rep. 177; 8 Sawyer, 543.

⁶ Const. of U. S., art. 1, sec. 18. See Vanhorne v. Dorrance, 2 Dallas, 304; Mercer v. McWilliams, Wright R. 132; Cushman v. Smith, 34 Me. 247; Polly v. Saratoga, etc., R.R. Co., 9 Barb. 449; Passmore v. Phila., etc., R.R. Co., 9 Phila. 579; Matter of Deansville Cemetery Assoc., 66 N. Y. 569; Pennsylv. R.R. Co. v. Balt., etc., R.R. Co., 60 Md. 263; New Orleans Water Works Co. v. St. Tammany Works, 4 Woods, 134; U. S. v. Oregon R.R., etc., Co., 16 Fed. Rep. 524; Hollingsworth v. Tensas, 17 Id. 109; 4 Woods, 280; Atlantic, etc., Tel. Co. v. Chicago, etc., R.R. Co., 6 Biss. 158; Railroad Co. v. Renwick, 102 U. S. 180. It is not a taking requiring compensation to destroy property to prevent the spread of a fire. Bowditch v. Boston, 101 U. S. 16, aff'g 4 Cliff. 323; nor to prevent a railroad company from using steam power in the streets of a city. Railroad Co. v. Richmond, 96 U. S. 521.

⁷ Ash v. Cummings, 50 N. H. 591; Blodgett v. Utica, etc., R.R. Co., 64 Barb. 580; Loughbridge v. Harris, 42

consent that it may be done afterward.¹ The mode pointed out by the statute for ascertaining and paying the compensation must be followed, or the proceedings will be

Ga. 500; *Graham v. Connersville, etc.*, R.R. Co., 36 Ind. 463; *Graham v. Columbus, etc.*, R.R. Co., 27 Id. 260; *Brady v. Bronson*, 45 Cal. 640; *Missouri, etc., R.R. Co. v. Ward*, 10 Kansas, 352; *Atchison, etc., R.R. Co. v. Weaver*, Ib. 344; *Comins v. Bradbury*, 10 Me. 447; *Storer v. Hobbs*, 52 Id. 144; *St. Joseph, etc., R.R. Co. v. Callender*, 13 Kansas, 496; *Const. of Kansas*, art. 12, sec. 4. In Pennsylvania, although the compensation need not have been ascertained and paid when private property is taken for public use, yet an adequate remedy must have been provided by which the owner can obtain compensation within a reasonable time. *Con. v. Pittsburg, etc., R.R. Co.*, 58 Pa. St. 26; *Dimmick v. Brodhead*, 75 Pa. St. 464. See *Matter of N. Y., etc., R.R. Co.*, 60 N. Y. 116; *Chesapeake, etc., R.R. Co. v. Patton*, 6 W. Va. 147; *Mettler v. Easton, etc., R.R. Co.*, 25 N. J. Eq. 214; *White v. Nashville, etc., R.R. Co.*, 7 Heisk. Tenn. 518. In Wisconsin, a railroad company which enters upon and appropriates land to its own use without making compensation therefor, or having its value ascertained as provided by law, and tendering the amount, is liable in trespass for the actual damages, whether the owner of the land has taken measures to have the value assessed or not. *Loop v. Chamberlain*, 20 Wis. 135; *Bohlman v. Green Bay, etc., R.R. Co.*, 30 Id. 105. In Indiana, in a similar case, the owner may maintain an action against the company to recover possession of the land. *Graham v. Columbus, etc., R.R. Co.*, *supra*. See *Loweree v. Newark*, 38 N. J. 151; *Matter of Long Island R.R. Co.*, 6 Thomp. & C. 298; *Eidemiller v. Wyandotte City*, 2 Dillon, 376; *Avery v. Fox*, 1 Abb. U. S. 246; *Crocker v. New York*, 15 Fed. Rep. 405; *Blanchard v. Kansas*, 16 Id. 444; *Pryzbylowicz v. Missouri River Co.*, 17 Id. 492; 3 McCrary, 586; *Atkinson v. Phila., etc., R.R. Co.*, 14 Hazard's Pa. Reg. 10. The amount of compensation is to be determined by inquiring what would the land be worth in the market for valuable uses if the sale were between private parties. *Boom Co. v. Patterson*, 98 U. S. 403. See *Kerr v. South Park Commrs.*, 117 U. S. 379; *Indianapolis, etc., R.R. Co. v. Pugh*, 85 Ind. 279; *Pittsburg, etc., R.R. Co. v. Robinson*, 95 Pa. St. 426; *Lycoming Gas, etc., Co. v. Moyer*, 99 Id. 615; *Hooper v. Savannah, etc., R.R. Co.*, 69 Ala. 529.

¹ *Knapp v. McAuley*, 39 Vt. 275. See *Dayton, etc., R.R. Co. v. Lewton*, 20 Ohio St. 401; *Goodin v. Cincinnati, etc., Canal Co.*, 18 Id. 169. In *Taylor v. Cedar Rapids, etc., R.R. Co.*, 25 Iowa, 371, the grantor had conveyed a right of way to a railroad company, upon condition that the depot of the company should be located within a certain distance of a particular place. The grantor did not surrender the land, and the railroad company failed to comply with the stipulations, but located the depot at a different place. It was held that a breach of the condition defeated the estate conveyed, and that, as the vendor had not given up possession, he might enforce the forfeiture, and have the damages for the right of way assessed as though no deed had ever been made. No question was raised as to the validity of the deed. In *U. S. v. Jones*, 109 U. S. 513, FIELD, J., in delivering the opinion of the

void.¹ Just compensation would obviously include not only a fair price for the land taken, but an allowance for the actual depreciation of the owner's remaining property in point of utility and convenience in consequence of the

court, said: "The position of the counsel of the United States in the court below, as we understand it, was substantially this: That the power vested in the Federal government to take private property for the public uses of the United States, is in its nature exclusive, and its exercise by any State is therefore prohibited as completely as though the prohibition were expressed in terms; that the power cannot therefore be delegated to the State of Wisconsin; that the ascertainment of the compensation is involved in the exercise of the power as a necessary part of it, inasmuch as there can be no lawful taking until compensation is made; and that the act of Congress transferring to the State board and State court the function of ascertaining the value of the property taken, and the amount of compensation to be made, is therefore invalid. There is, in this position, an assumption that the ascertainment of the amount of compensation to be made is an essential element of the power of appropriation; but such is not the case. . . . The provision found in the fifth amendment to the Federal Constitution, and in the constitutions of the several States, for just compensation for the property taken, is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised. It is undoubtedly true that the power of appropriating private property to public uses vested in the general government cannot be transferred to a State any more than its other sovereign attributes; and that when the use to which the property taken is applied is public, the propriety

or expediency of the appropriation cannot be called in question by any other authority. But there is no reason why the compensation to be made may not be ascertained by any appropriate tribunal capable of estimating the value of the property. There is nothing in the nature of the matter to be determined which calls for the establishment of any special tribunal by the appropriating power. The proceeding for the ascertainment of the value of the property, and consequent compensation to be made, is merely an inquisition to establish a particular fact as a preliminary to the actual taking; and it may be prosecuted before commissioners or special boards, or the courts, with or without the intervention of a jury, as the legislative power may designate. All that is required is that it shall be conducted in some fair and just manner, with opportunity to the owners of the property to present evidence as to its value, and to be heard thereon. Whether the tribunal shall be created directly by an act of Congress, or one already established by the States shall be adopted for the occasion, is a mere matter of legislative discretion." See *Austin v. Rutland R.R. Co.*, 17 Fed. Rep. 466.

¹ *Stanford v. Worn*, 27 Cal. 171; *Brown v. Powell*, 25 Pa. St. 229; *Cunningham v. Pacific R.R. Co.*, 61 Mo. 33. Under sec. 5, art. 13, of the constitution of Ohio, providing that "no right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money or first secured by a deposit of money to the owner irrespective of any benefit from any improvement pro-

condemnation.¹ It has accordingly been held that in assessing damages for railroad purposes the jury may take into consideration injuries to adjoining lands of the same owner, such as cutting fields into inconvenient shapes, interruption of access to water, necessity of additional fencing, etc.² The owner of real estate is entitled to the natu-

posed by such corporation, which compensation shall be ascertained by a jury of twelve men in a court of record," something more is required than a verdict of the jury before the corporation can deposit the money and demand possession. The jury merely fixes by its verdict the compensation which is to be made in the event the land is taken. The constitution contemplates a judicial proceeding in which the effect of the judgment is to divest the owner of the title and possession of his property and to invest both to the extent of the condemnation in the corporation. *Wagner v. R.R. Co.*, 38 Ohio St. 32.

¹ See *Rondout, etc., R.R. Co. v. Deyo*, 5 Lansing, 298; *Matter of Union Village, etc., R.R. Co.*, 53 Barb. 457; *Matter of Utica, etc., R.R. Co.*, 56 Id. 456; *Matter of Poughkeepsie, etc., R.R. Co.*, 63 Id. 151; *Albany, etc., R.R. Co. v. Dayton*, 10 Abb. Pr. N. S. 182; *Black River, etc., R.R. Co. v. Barnard*, 9 Hun, 104; *Matter of Prospect Park, etc., R.R. Co.*, 24 Id. 199; *Walker v. Old Colony R.R. Co.*, 103 Mass. 10; *Tucker v. Mass., etc., R.R. Co.*, 118 Id. 546; *Wilmington, etc., R.R. Co. v. Stauffer*, 60 Pa. St. 374; *East Brandywine, etc., R.R. Co. v. Rauck*, 78 Id. 454; *Chenango R.R. Co. v. Braham*, 79 Id. 447; *Somerville, etc., R.R. Co. v. Doughty*, 2 Zab. 495; *Page v. Chicago, etc., R.R. Co.*, 70 Ill. 324; *Peoria, etc., R.R. Co. v. Sawyer*, 71 Id. 361; *Brooks v. Davenport, etc., R.R. Co.*, 37 Iowa, 99; *Gear v. R.R. Co.*, 43 Id. 83; *Powers v. Hazleton,*

etc., R.R. Co., 33 Ohio St. 429; *Louisville, etc., R.R. Co. v. Thompson*, 18 B. Mon. 735; *Minnesota Valley R.R. Co. v. Doran*, 15 Minn. 230; *Sherwood v. St. Paul, etc., R.R. Co.*, 21 Id. 127; *San Francisco, etc., R.R. Co. v. Caldwell*, 31 Cal. 367; *Carson v. Central R.R. Co.*, 35 Id. 325; *North Pacific R.R. Co. v. Reynolds*, 50 Id. 90; *Bangor, etc., R.R. Co. v. McComb*, 60 Me. 290; *Eaton v. Boston, etc., R.R. Co.*, 51 N. H. 504; *Adden v. White Mts., etc., R.R. Co.*, 55 Id. 413; *Mississippi River Bridge Co. v. Ring*, 58 Mo. 491; *Baltimore, etc., R.R. Co. v. Lansing*, 52 Ind. 229; *Welch v. Milwaukee, etc., R.R. Co.*, 27 Wis. 108; *Bigelow v. West Wisconsin R.R. Co.*, 1b. 478; *Lyon v. Green Bay, etc., R.R. Co.*, 42 Id. 538; *Virginia, etc., R.R. Co. v. Elliott*, 5 Nevada, 358; *Virginia, etc., R.R. Co. v. Hewry*, 8 Id. 165.

² *White Water Valley R.R. Co. v. McClure*, 29 Ind. 536. Where the charter of a railroad company provided that the company might enter upon and use all such land as should be necessary, paying all damages that should thereby arise to any person or persons, and an owner of property on a street in a city crossed by the railroad brought an action against the company for damages resulting from an excavation for the bed of the railroad in the land adjoining to that of the plaintiff, it was held that he was entitled to recover. *Bradley v. N. Y. & N. H. R.R. Co.*, 21 Conn. 294. Whether a State legislature under the provision of the constitution prohibiting the taking of private

ral flow of a stream of water over his land, and an act authorizing a corporation to take such water for manufacturing purposes without compensation would be unconstitutional.¹ A railroad company may construct its line through a public street without providing compensation to the owners of lots abutting thereon who have no title to the soil of the street;² but it is otherwise where the fee of the street remains in the owners of the abutting lots;³ and the construction of a second railroad track through the same street would constitute a new and distinct servitude, entitling such owners to additional compensation.⁴ But a party though an abutting owner simply, the fee of the

property for public use without just compensation could, by virtue of the power of eminent domain, authorize a railroad company to construct its road on the land of an individual without providing compensation for damages of a consequential or incidental character, but only for such as were direct and immediate and occasioned by the mere taking of the land—*quare*. "That the legislature possesses such an unrestricted power we perceive no reason to doubt." *Ib.*, per STORRS, J. Congress, in granting to a corporation power to build a bridge across a navigable river, reserved the right to withdraw its assent or to direct necessary alterations in the bridge if it should at any time substantially and materially obstruct the free navigation of the river. The bridge being nearly completed, in accordance with all of the conditions imposed, an act of Congress was passed making it unlawful for the company or any other person to proceed with the erection of the bridge without important changes in its structure, including a wider span and a higher elevation. It was held that the owners of the bridge were not entitled to compensation for the alterations thus made. *Bridge Co. v. U. S.*,

105 U. S. (15 Otto) 470. MILLER, FIELD, and BRADLEY, JJ., dissenting.

¹ *Harding v. Stamford Water Power Co.*, 41 Conn. 87. See *Stodghill v. C. B. & Q. R. Co.*, 43 Iowa, 26; *Lake Superior, etc., R.R. Co. v. Greve*, 17 Minn. 322. A railroad company cannot lawfully enter and dig ditches on land adjacent to its right of way, though such ditches are necessary for the protection of the railroad. *State v. Armell*, 8 Kansas, 288. Private property may be taken within the constitutional prohibition by depriving the owner of its beneficial use and enjoyment, although he continues to hold the title; as by the backing of the water of a river by a dam authorized by law so as to overflow the land of an individual, thus destroying its usefulness to him. *Pumpelly v. Green Bay Co.*, 13 Wall. 166.

² *Carson v. Central R.R. Co.*, 35 Cal. 325; *People v. Kerr*, 27 N. Y. 188.

³ *Stetson v. Chicago, etc., R.R. Co.*, 75 Ill. 74; *Cox v. Louisville, etc., R.R. Co.*, 48 Ind. 178; *Gray v. First Division of St. Paul, etc., R.R. Co.*, 13 Minn. 315.

⁴ *Southern Pacific R.R. Co. v. Reed*, 41 Cal. 256.

street being in the city, is entitled to the use of the street, and neither the legislature nor the city can devote it to purposes inconsistent with street uses without compensation. An unreasonable use of the street by a street railroad company by converting the street into a place for the storage or deposit of cars to the injury of adjoining owners will give a right of action to the property-owners specially injured thereby.¹ In an action to restrain a railroad company from locating its road in the street of a city opposite the plaintiff's premises, the complaint alleged that the defendant was about to construct a railroad above the surface of the street in such a manner as would deprive the plaintiff of the benefit of light and air. It was proved that the road was to be built upon a series of columns about fifteen inches square, fourteen feet and six inches high, placed five inches inside the edge of the sidewalk, and carrying girders from thirty-three to thirty-nine inches deep for the support of cross-ties for three sets of rails for engines to be propelled by steam. The cars were to be eleven feet high above the track, would project two feet over the sidewalk on either side, would pass within nine feet of the plaintiff's buildings, and run once in three minutes at the rate of eighteen miles an hour. The complaint having been dismissed, the Court of Appeals, in reversing the judgment of dismissal, held that even if the fee of the street was in the city, the plaintiff, as abutting owner, had such a right to air, light, and access, as entitled him to have the street kept open for those uses, until, by legal process, and upon just compensation, the right had been taken from him.²

¹ Mahady v. Bushwick R.R. Co., 91 N. Y. 148.

² Story v. N. Y. Elevated R.R. Co., 90 N. Y. 122, MILLER, EARL, and FINCH, JJ., dissenting. See Arnold v. Hudson River R.R. Co., 55 N. Y. 661; Doyle v. Lord, 64 Id. 432; 21 Am. R. 629. In England, it was held

that an easement was an interest in land for the invasion of which compensation might be claimed under the Land Clauses Consolidation Act, 8 Vict. Ch. 18; as where damages are sustained in consequence of diminution of light to the plaintiff's premises by the erection near them of the de-

The construction of a railroad track on a turnpike, leaving room for ordinary vehicles, is not a new, but only a modification of the old use, and the land-owners along the line of the road would not be entitled to new compensation, notwithstanding the railroad company should change the grade of the turnpike, if changes of grade were provided for by the charter of the turnpike company.¹ But, if the legislature should authorize a railroad company to appropriate a highway to its own use by destroying the ordinary and legal right of the public to use it as a highway, compensation would have to be provided.² Where land previ-

pendant's works. BOVILL, Ch. J., said: "The improvement is common to all the neighborhood, but the injury to the plaintiff's premises by the diminution of light is peculiar to the plaintiff." *Eagle v. Charing Cross R.R. Co.*, L. R. 2, C. P. 638.

¹ *Peddicord v. Baltimore, etc., R.R. Co.*, 34 Md. 463. See *Baltimore, etc., Turnp. Co. v. Union R.R. Co.*, 35 Md. 224. Where an act incorporating a turnpike company authorized the company to construct the turnpike along a public highway, and provided that compensation should be made for all damages which the owners of the land over which the road passed should sustain by reason of the construction of the road, and also for all damages done to adjoining lands, and all materials taken therefrom; but provided no compensation for the value of the soil occupied by the road, it was held not a taking of private property for public use without just compensation; the title of the soil not having been changed, but remaining as it was before, in the former owner. *Wright v. Carter*, 3 Dutcher, N. J. 76.

² *Morris & Essex R.R. Co. v. New-ark*, 2 Stockt. Ch. 352. Highways "have not been dedicated to any particular mode of travel or use. They

are intended, and are devoted to public convenience, and to the profit and pleasure of the public as thoroughfares. As means of facilitating intercourse in matters of business or pleasure between one city or town and another, or between one man's dwelling-house and farm and another's, it is perfectly consistent with the purposes for which they were originally designated and intended, that the public authorities who have the control of them as public highways should adapt them in their use to the conveniences and improvements of the age. For the legislature to authorize the use of a public highway for the purpose of a railroad in such a manner as not entirely to destroy its use in the ordinary mode, is not inconsistent with the purposes for which the public highway was originally intended. It may render the ordinary mode of travel less convenient, or perhaps dangerous; and yet the benefit to the public by the use of it as a highway, upon an iron superstructure, may very greatly outweigh and overbalance such damage and inconvenience. The legislature must be the judges as to the benefit to the public, and to their authority individuals and the public must submit." *Ib.*, per WILLIAMSON, Chancellor. See *Williams v. N. Y. Cent.*

ously condemned and used as a canal, is transferred by an act of the legislature to a railroad company for the purposes of its road, owners are entitled to compensation for the additional burdens and inconveniences not common to the public thereby imposed.¹ A corporation, the franchises or property of which is appropriated by another corporation, has the same rights, and is afforded the same protection as in the case of the taking of the private property of individuals; the fact that property has been taken for one public use not constituting it public property for all other purposes.² Where indebtedness is created in behalf of the State for private property taken and appropriated to public use, the State is liable to pay interest on such indebtedness, payment of which the court will enforce whenever, through the medium of public officers, it acquires jurisdiction of the case.³

When a corporation is empowered by its charter to make a public improvement which will necessarily require the use or taking of land belonging to the State, and no negative words are contained in the charter, and no provision made for compensation for the land so required to be taken, the right to use or take the same for such purpose, is conferred upon the corporation without making compensation therefor. Where the charter authorized the corporation to build and maintain levees and embankments along the shores of a river, in order to improve the navigation, and nothing was said in the charter as to compen-

R.R. Co., 18 Barb., where views similar to the foregoing were expressed by the court.

¹ Hatch v. Cincinnati, etc., R.R. Co., 18 Ohio St. 92; Pennsylvania, etc., R.R. Co. v. Bunnell, 81 Pa. St. 414.

² Grand Rapids, etc., R.R. Co. v. Grand Rapids, etc., R.R. Co., 35 Mich. 265; Chicago, etc., R.R. Co. v. Spring-

field, etc., R.R. Co., 67 Ill. 142; Cincinnati, etc., R.R. Co. v. Danville, etc., R.R. Co., 75 Id. 113; Eastern R.R. Co. v. Boston, etc., R.R. Co., 111 Mass. 125. See Mass., etc., R.R. Co. v. Boston, etc., R.R. Co., 121 Mass. 124.

³ People v. Canal Commrs., 5 Denio, 401.

sation to the State, it was held fairly inferable that the legislature intended to grant the right to use such of the State lands as should be required for the above-mentioned purpose, without compensation.¹

In New York, the laying of a highway across a railroad track may be authorized by an act of the legislature without compensation, even where the company has title to the land in fee by purchase, the right of such corporations to hold real estate being limited by statute to the uses of the incorporation, and all land being deemed to have been acquired by them solely for public use.² Trees standing on land taken by a railroad company by compulsory proceedings, and materials removed in grading the track, may be used in the construction of its road.³ As a rule, when land is acquired compulsorily by a railroad company for the

¹ Black River Improvement Co. v. LaCrosse Booming & Transportation Co., 54 Wis. 659, referring to Ind. C. R.R. Co. v. State, 3 Ind. 421; Pa. R.R. Co. v. R.R. Co., 8 C. E. Green, N. J. 157; Davis v. E. T. & Ga. R.R. Co., 1 Sneed, Tenn. 94; U. S. v. R.R. Bridge Co., 6 McLean, 517. Although an act of the legislature, passed after a contract is made, which withdraws property then liable to be seized and sold in enforcement of that contract from the power of the courts to seize and sell it, impairs the obligation of a contract, yet this is not the case where a statute, dealing with property not subject to such sale, continues the exemption of that which represents in the hands of the same owner the property so exempt; as where a statute authorizes a city to convert its ownership of public property into the shares of a joint stock corporation, and declares that these shares shall be exempt from judicial sale for the debts of the

city. New Orleans v. Morris, 105 U. S. (15 Otto) 600.

² Boston, etc., R.R. Co. v. Greenbush, 5 Lansing, 461. See Yates v. Van De Bogert, 56 N. Y. 526.

³ Taylor v. N. Y., etc., R.R. Co., 38 N. J. 28; Aldrich v. Drury, 8 R. I. 554; Chapin v. Sullivan R.R. Co., 39 N. H. 564; Blake v. Rich, 34 N. H. 282; Henry v. Dubuque & Pacific R.R. Co., 2 Iowa, 288; Western Union Tel. Co. v. Rich, 19 Kansas, 517; 27 Am. R. 159. A railroad company which has the fee of land taken for its track is entitled to unobstructed possession above its road, although the road be laid through a tunnel or archway. Junction R.R. Co. v. Boyd, 8 Phila. 224. But it has been held in Pennsylvania that the owner of land taken by a railroad company under the general law, may insert pipes for the conveyance of oil under the track, if he can do so without interfering with or impairing the easement of the company. Hasson v. Oil Creek, etc., R.R. Co., 1b. 556.

purposes of its road, the fee remains in the original owners subject to the use of the company, and when that use ceases, the property returns or reverts to the owner of the soil.¹ It has been said that "adherence to this rule is the only mode by which a corporation is to be held from diverting its acquisitions, obtained in the name of public necessity, to private uses, and doing indirectly what cannot be done directly."² On an assessment of damages for a right of way, appropriated by a railroad company, the court instructed the jury that the fee simple remained in the owner of the land taken, subject to use by the company for the purposes of its road. It was held unnecessary for the court, in the absence of any testimony, to particularize all of the possible uses and advantages which the plaintiff might retain in the land.³

The grant of the right of way through the public lands to the Northern Pacific Railroad Company is present and absolute, subject to no conditions except those necessarily implied, such as that the road should be constructed and used for the purpose designed. There is nothing in the policy of the government with respect to the public land which would call for any qualification of the terms, inasmuch as the grant of the right of way contains no reservations or exceptions such as are found in the sections of the charter granting land in aid of the construction of the road.⁴ If subsequent to the acquirement by the company

¹ *Heard v. Brooklyn*, 60 N. Y. 242; *Hastings v. B. & M. R.R. Co.*, 38 Iowa, 316; *Kellogg v. Malin*, 50 Mo. 496; *Hasson v. Oil Creek, etc., R.R. Co.*, *supra*; *West Pa. R.R. Co. v. Johnson*, 59 Pa. St. 290; *Dean v. Sullivan R.R. Co.*, 22 N. H. 316; *Kansas Centr. R. R. Co. v. Allen*, 22 Kansas, 285. *Contra*, *Troy, etc., R.R. Co. v. Potter*, 42 Vt. 265; *Robbins v. St. Paul, etc., R.R. Co.*, 22 Minn. 286. See *Wood-*

worth v. Payne, 74 N. Y. 196; *Pinkerton v. Boston, etc., R.R. Co.*, 109 Mass. 527.

² *Jessup v. Loucks*, 55 Pa. St. 350, per THOMPSON, J.

³ *Leavenworth, etc., R.R. Co. v. Paul*, 28 Kansas, 816.

⁴ *Railroad Co. v. Baldwin*, 103 U. S. 426; *Wilkinson v. Northern Pacific R. R. Co.*, 5 Montana, 538.

of the right of way, the land is owned and occupied as placer mining grounds, the latter right is inferior to the former, and must yield to it.¹

¹ Ibid. See *Western Pacific R.R. Co. v. Tevis*, 41 Cal. 489. The amount found due to the owner of land on which there is a mortgage, in the exercise by a railroad company of its right of eminent domain, should first be applied to the payment of the amount due on the mortgage, and the balance be paid to the holder of the legal title. *Dodge v. South Western R.R. Co.*, 20 Nebraska, 276.

END OF VOL. I.

